Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of :	)	
	)	
The Commission's Cable Horizontal and Vertical Ownership Limits	)	MM Docket No. 92-264
	)	

<u>COMMENTS OF THE AMERICA CHANNEL</u>
<u>ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING</u>

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Dated: August 8, 2005

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Summary

The America Channel is an independent network established to offer family-friendly cable programming that celebrates America, its communities, unsung heroes and ordinary people who accomplish the extraordinary.

The market entry and survival of independently owned programming networks benefits competition, consumer choice, consumer pricing and the diversity of ideas and information in the marketplace, and is vital to the long term health of the television programming industry as well as our democracy. Congress correctly realized that unchecked horizontal consolidation among MVPDs and vertical integration by these MVPDs with upstream content providers would result in the foreclosure of independent networks from the marketplace, and mandated that the Commission impose horizontal and vertical ownership limits to protect the industry and the public from the harms that would result.

The "open field" approach used in setting horizontal limits has not succeeded in preventing these harms. While this is partly because the Commission's historical subscriber threshold for network viability was too low (15 to 20 million subscribers instead of the generally accepted 50 million subscribers), it is also because there are factors necessary for network survival, such as access to the top television markets, which are not a direct function of subscriber availability and therefore not captured by a strict market share analysis.

Advertisers do not value all markets and all subscribers equally. National advertisers place a significant premium on reaching the "top television markets" and those networks which do not substantially penetrate the top markets are at a severe

disadvantage in the competition for advertising dollars relative to similar networks that do. To date, DMA analysis has not been included in the Commission's rulemaking, and as a result, two MVPDs have been able to dominate a disproportionate share of top markets.[1]

Today, these same two operators, Comcast and Time Warner, have emerged as disproportionately powerful gatekeepers to network entry and survival. Empirical evidence presented herein shows that a denial of carriage by either Comcast or Time Warner will prevent a cable network from reaching even 25 million households (in itself an unsustainable plateau for advertising supported networks), in spite of the presence of a large open field, increased competition among MVPDs and upgraded cable systems with expanded capacity.

That the market power of these two MVPDs so greatly exceeds their market share, contradicts the open field assumption that smaller MVPDs make carriage decisions independent of the actions of the largest MVPDs. However, both the MVPD community and the investment community must allocate scarce resources to launch a new programming network, and they are reluctant to do so if a network's survival is in doubt. The empirical evidence detailed in Section III shows that advertising supported cable networks which are denied carriage by Comcast and Time Warner are unlikely to achieve the subscriber counts and distribution to top markets necessary to survive in the marketplace. Furthermore, the high correlation between the carriage decisions of these two MSOs (presented in Section IV) suggests that a denial by one is likely followed by a denial by the other and subsequently by other MVPDs as well. In short, the current

[1] Post Adelphia transactions Comcast or Time Warner will serve 46 of the top 50 markets (see MB Docket 05-192, Comments of The America Channel at 29-33)

ownership limits have created a market structure in which two MVPDs individually have the ability to prevent the survival (and therefore the market entry) of independent networks.

If the Commission's aim is indeed to provide, "competition sufficient to provide alternative means for programmers viably to reach consumer, thus protecting consumer choice and welfare,"[2] it must view the marketplace in a manner which includes the experiences of those attempting to enter and survive there. Market share analysis alone is not sufficient to capture the multivariate nature of this environment. We therefore urge the Commission to:

1. Recognize 50 million subscribers as a key viability threshold for networks,
2. Fully incorporate a DMA analysis into its evaluation of ownership limits, and
3. Recognize the impact that denial of carriage by the top MVPDs has on other MVPDs

While some have claimed (in previous comments to this proceeding) that competition from DBS providers and expanded channel capacity reduces the incentive of vertically integrated MVPDs to foreclose independent networks from the marketplace, we believe the converse is true. Our research shows that vertically integrated cable MVPDs disproportionately favor their own networks, as well as those affiliated with other cable MVPDs and major broadcasters, in allocating channel capacity. Section 613(f)(2)(B) of the Communications Act requires the Commission to ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems. We respectfully submit that it is not the ceiling applied to vertical ownership limits that has failed to protect independent

[2] Second Further Notice at 19

networks from discriminatory behavior by vertically integrated MVPDs, rather it is an overly narrow interpretation of the term “affiliated.” So long as MVPDs are able to satisfy the Commission’s requirements by adding networks owned by Viacom, Disney, NBC Universal and other major media conglomerates, they will do so at the expense of independent networks and to the detriment of diversity, competition, consumer choice and pricing. The Commission should, in the establishment of vertical ownership limits, expand its interpretation of the term “affiliated” networks to include those networks owned by the major broadcasters, or make other modifications to ensure that independent networks are not barred from competing in the marketplace.

Independent networks serve vital functions in the delivery of video programming to consumers, and the top MVPDs’ practice of restricting new, independent firms from entering the marketplace – outlined above and expanded upon in these comments – increases consumer prices, impedes competition and impairs the diversity of ideas and information in the marketplace. Increased competition from independently owned networks for carriage, tier placement, channel assignments and more would put downward pressure on the programming license fees which MVPDs are required to pay and force existing networks to improve their value proposition, all of which would inure to the benefit of the consumer. In addition, new independent networks often create an entirely new market for programming of a specific genre or niche and increase competition for more mainstream programming, which in turn promotes investment in independent production companies and leads to the creation of high quality programming. Importantly, it is the increased diversity of network ownership, provided by independent network entry and survival, which ensures the diversity of ideas and information in the marketplace.

While the Commission's NPRM focuses on industry-wide aspects of the horizontal and vertical structure of the cable industry, we offer a perspective on how the two largest vertically integrated cable MSOs, have locked out independent programmers in favor of their own vertically affiliated programming. We have filed similar comments in the MB 05-192 Docket, and we reiterate here many of the same arguments because we believe that the practices of two of the largest vertically integrated MVPDs are equally relevant to the Commission's work in this proceeding.

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I. INTRODUCTION

A. THE AMERICA CHANNEL IS WELL POSITIONED TO COMMENT ON THESE PROCEEDINGS

The America Channel is a new non-fiction network that tells the extraordinary stories of ordinary people. It is a 24/7 exploration of what the country is today - a nation of powerful personal stories, diverse people and cultures, wide-ranging opinions, and lofty dreams and ambitions. TAC's programming showcases American communities, campuses, local heroes, and ordinary people who accomplish extraordinary things throughout America.

As an independently owned network which has been in development for nearly four years and has sought carriage commitments from the MVPD community for the past two years, The America Channel is particularly qualified to comment on issues raised in the Second Further Notice of Proposed Rulemaking. The America Channel knows firsthand the foreclosing effect that horizontal and vertical consolidation within the Commission's prescribed limits has already had.

B. INTRODUCTION TO COMMENTS

Congress imposed vertical and horizontal ownership limits in large part to ensure the free market entry of independently owned networks and the positive impact on competition, consumer pricing, consumer choice and the diversity of ideas and information in the marketplace that such entry brings. Congress' primary concern, that horizontal and vertical consolidation could thwart market entry and impair these public benefits was well placed. As this comment will demonstrate, there are currently two MVPDs that each have the market power to determine the survival of independent networks: Comcast and Time Warner.

It is our view that market share does not equal market power, but rather that, for the two largest cable operators, market power vastly exceeds market share. This contradicts the historical use of market share analysis to determine market power and impose horizontal limits. It was reasoned that, so long as the "open field" was large enough to mathematically allow a network to reach a portion of television households sufficient to sustain operations, market entry by independent networks was ensured. However, empirical evidence shows that an open field approach does not capture the foreclosure that independent networks experience in their attempt to reach viability, in part because the Commission's historical subscriber threshold for viability was too low (15 to 20 million subscribers instead of the generally accepted 50 million subscribers), but also because there are factors necessary for network survival that are not a direct function of subscriber availability.

As explained in Section II, advertising supported networks cannot be viable in the long term without distribution to 50 million subscribers in 5 to 7 years. However, access to the top television markets, which are disproportionately important to advertisers, is also crucial to network survival. Furthermore, market share analysis assumes that each MVPD makes carriage decisions in a vacuum – and that denial of carriage by the largest MVPDs has no influence on the carriage decisions of other MVPDs. The MVPD community and the investment community, which can enable independent networks to enter the market, are reluctant to dedicate resources to a network whose survival is in doubt. They view carriage by Comcast and Time Warner, the two largest MSOs, as crucial indicators of a network's survivability. In fact, 100 percent of the 92 cable networks which we observed to reach 20 million subscribers, had secured carriage with Comcast or Time Warner, and 98 percent secured carriage with both MSOs. No network that failed to gain carriage with at least one of these two MSOs, succeeded in achieving the thresholds essential to viability and survival (See Section III below). And this despite the presence of at least a 50 million household open field, expanded channel capacity and increased market competition from DBS and telcos, which some argue are more than sufficient to prevent such market dominance. As a result, a denial of carriage by even one of these MSOs (and as shown in Section IV below, the likelihood is high that a "no" decision by one would be accompanied by the same decision by the other) prevents networks from reaching key thresholds of viability.

The entry and survival of independently owned cable networks has a positive impact on competition, consumer choice, consumer pricing, and the diversity of ideas and information in the marketplace (see below, particularly Sections VIII and IX). However, vertically integrated media companies have a strong disincentive to embrace new networks. New independent networks are competitors. They compete directly with operator-owned networks on several levels: competition for viewers, competition for advertising dollars (including in local markets), and competition for channel capacity. And, cable operators know that a fully distributed network is frequently worth in the billions of dollars in asset value – and such value in the hands of independent persons or groups is foregone value to an operator. As such, (and as demonstrated in Section VI) these MVPDs actively restrict the entry of independent networks, favoring their own networks and those affiliated with other media conglomerates.

Independent networks, vital to the Commission's goals of diversity and competition,[3] are endangered. (The finding of the Eleventh Annual Report, that there exist 196 independent networks, is deconstructed in Section XI below). Current horizontal and vertical ownership limits do not appear to have provided the protections necessary to ensure market entry and survival or prevent discriminatory behavior by the largest MVPDs. Comcast and Time Warner, as the result of geographic concentration in the top 50 television markets as well as sheer size, have a market power which vastly exceeds their market share and positions them squarely between new networks and the path to profitability required for network survival.

[3] Second Further Notice at 14

II. VIABILITY FACTORS FOR A NEW NETWORK

We respectfully request that the Commission take into account in deciding where to set ownership limits what these limits will mean for independent networks trying to enter and survive in the MVPD marketplace. There are two key "viability factors" for a new advertising supported network. The first is the ability of a network to reliably forecast distribution to 50 million households in 5 to 7 years, and the second is the ability of a network to access the top television markets. Without both of these viability factors, a network will be unlikely to generate the investment necessary to enter the marketplace.

A. SUBSCRIBERSHIP: NETWORK VIABILITY AT 50 MILLION HOUSEHOLDS

In its Second Further Notice of Proposed Rulemaking, the Commission cites ample testimony from MB Docket 04-207 suggesting that the Commission's assumptions as to the subscriber thresholds required for network viability that drove its actions in the *1999 Cable Ownership Order* are no longer applicable.[4] Crucial among these is that current survivability targets for networks are not 15 to 20 million subscribers, as was previously assumed, but 40 to 60 million subscribers – a threshold which is supported by networks both independent and conglomerate owned, as well as top media analysts.[5] Exhibit 1 of this document includes excerpts from the comments of various programmers in MB Docket 04-207, portions of which are provided in the table below.

[4] Second Further Notice (MB Docket 92-264) at 45-46
[5] Id. at 46, especially footnote #311. Oxygen, Crown Media and Bloomberg are independently owned companies. Non-independent commenters include: TV One (substantially owned by Comcast Corporation), GSN (substantially owned by Liberty Media), and Viacom.

Commenter in MB Docket 04-207	**Subscriber Viability Threshold cited**	**Comment** (Expanded comments are included as Exhibit 1)
Viacom (owner of at least 18 advertising supported cable networks in the U.S. and more than 100 networks worldwide)	50 million	"In addition, national advertisers often have minimum subscriber base requirements. In Viacom's experience, many national advertisers regard a minimum subscriber base of approximately 50 million households as necessary in order to reach a meaningful number of viewers."
GSN - The Network for Games	50 million	"Currently, 50 million subscribers is the approximate threshold for achieving meaningful national advertising revenues... Between 2002 and 2003, GSN increased its distribution from 43 million subscribers to over 50 million, an increase of approximately 16 percent. During that same period, however, GSN's general rate advertising revenues more than doubled...The number of national advertisers buying time on GSN also increased substantially -- nearly doubling during the period after GSN passed the 50 million subscriber mark."
Crown Media (Hallmark Channel and Hallmark Movie Channel)	50 – 60 million	"Subscribers to Hallmark Channel more than doubled from 2000 to 2003 with distribution topping 56 million in 2003. As a result of that growth, coupled with improved ratings, advertising revenues increased by more than four times, with the largest percentage increase in advertising revenues occurring when distribution approached 56 million and more subscribers."
A&E (owner of at least 5 advertising supported cable networks)	60 million to ensure original programming, 40 million otherwise	"A multichannel network must be able to show it reaches at least forty million subscribers before it can reasonably expect to attract significant advertising revenue. In order to attract sufficient advertising revenue to afford to pay for and provide a meaningful quantity of original programming, the network must reach approximately sixty million subscribers. "
TV One (Owned in part by Comcast)	40 million or more	In practice, because of the number of networks competing in the market, advertising does not become a self-sustaining revenue stream—where a combination of advertising and affiliate fees exceeds operating, marketing and programming expenses--until a network reaches 40 million or more households."
Oxygen	45 – 50 million	"Nielsen will rate a network with 20 to 25 million subscribers, but the ratings data are unstable and of little use until the network reaches 45 to 50 million subscribers. "

In support of their threshold recommendations, the above referenced commenters all cite behaviors of the advertising community with regard to cable networks as being primarily driven by subscriber numbers. Networks in fewer than 50 million households are often excluded altogether from the purchasing considerations of national advertisers, and those advertisers that will apportion money to "below 50" networks do so on a reduced basis and often at discounted rates, compared with those "above 50." For example, Viacom, which owns at least 18 advertising supported cable networks in the U.S. (and 100 networks worldwide), states that in their experience many advertisers use 50 million subscribers as a minimum threshold for inclusion of a network in their media buys.[6] Both GSN and Crown Media reported disproportionate gains in both the number of advertisers purchasing time and the associated revenue that accompanied their crossing of the 50 million subscriber threshold.[7] The experiences of other networks cited above and elaborated on in Exhibit 1, support these statements. In fact the *New York Times* on July 25, 2005 stated the following: "Generally, the threshold of success for aspiring cable or satellite channels is about 50 million homes, said Tom Wolzien, a media analyst who owns a consulting firm."[8]

Equally important to the 50 million subscriber threshold established above is the concept of *entry* thresholds. The Media Bureau's *Survival Analysis of Cable Networks* correctly makes a distinction between the elements necessary to sustain an existing programming network and those required to enter the market with a new service.[9] Specifically, an existing programming service (which has already incurred sunk costs) need only earn rents in excess of operational expenses in order to remain solvent. A market entrant however, must show a clear and credible path to *profitability* (in which sunk costs are recouped) in order to generate the significant initial investment required to

[6] MB Docket 04-207. Comments by Viacom at 19
[7] Comments by GSN at 3-4; Comments by Crown Media at 6
[8] New York Times 07-25-2005 *For Gore a Reincarnation on the Other Side of the Camera.*
[9] *A Survival Analysis of Cable Networks*, FCC Media Bureau Staff Research Paper No. 2004-1 at 5. "Because a cable network incurs sunk entry costs, the quasi-rents a cable network needs to stay in business are clearly far less than the expected profits that induce entry by a cable network."

enter the marketplace.[10] Revenue and profitability for cable networks are direct functions of distribution. The Survival Analysis therefore can be understood to mean that while an existing network which is unable to forecast carriage to more than 50 million subscribers may manage to survive for some time by reducing the quality and quantity of original programming, an entrant does not have the same flexibility. Its ability to generate the investment and carriage agreements necessary to enter the market is directly related to its ability to forecast a credible path to *profitability,* something which for advertising supported networks is driven by distribution to 50 million households, not 20 million.

This "survival vs. entry" distinction is crucial and must be recognized by the commission as it seeks to understand the subscriber levels and other factors that must be obtained by a programming network in order to be economically viable – a first step toward determining appropriate horizontal ownership limits.

Investors who back new programming networks understand the economics of subscriber thresholds. They are aware of the 50 million subscriber tipping point with regard to advertising revenue. An advertising supported programming network seeking to raise launch financing in the capital markets must show at the very least a credible path to 50 million subscribers in order to raise the capital necessary for launch. In addition, the network needs to project surpassing that 50 million subscriber threshold within 5 to 7 years – a time frame generally accepted in the industry. In fact, for some time it was known in the industry that Comcast, in building financial models for internally funded networks, used 50 million subscribers within 5 years, as a benchmark for a successful cable channel initiative. Roger Ailes, CEO of Fox News recently said that Fox's planned

[10] *A Survival Analysis of Cable Networks*, FCC Media Bureau Staff Research Paper No. 2004-1 at 5. "Because a cable network incurs sunk entry costs, the quasi-rents a cable network needs to stay in business are clearly far less than the expected profits that induce entry by a cable network."

business news channel would have to reach 40 million homes within three years for the channel to be a success[11] (and presumably grow steadily from there).

To be sure, 20 million subscribers is still a key threshold for new networks, as it represents the minimum level of distribution necessary for a network to be Nielsen rated. However, the investment community and the MVPD community in determining whether to allocate scarce resources to a new ad-supported network, focus on that network's ability to reach 50 million households. As will be shown in Section III below, if a new network cannot forecast carriage to 50 million homes within 5 to 7 years, reaching even 25 million households becomes nearly impossible.

<u>We therefore urge the Commission to recognize 50 million subscribers as its "threshold of viability" for a new programming network, and consider that threshold when evaluating the ability of one or more MVPDs to foreclose an independent network from the marketplace. As will be shown in Section III, our own research demonstrates that Comcast and Time Warner Cable are the sole gatekeepers to the market entry of an advertising supported network.</u>

B. ACCESS TO TOP MARKETS IS VITAL TO NETWORK VIABILITY

In addition to subscriber milestones, also vital to an advertising-supported network's survival and profitability is the geographic dispersion of those subscribers. Advertisers do not value all subscribers and markets equally. National advertisers place a significant premium on reaching the "top television markets."[12] In addition to the

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[11] The Wall Street Journal. *Fox Quietly Gears Up Its Business Channel to Challenge CNBC*. Julia Angwin. June 20, 2005.
[12] "Top Market" refers to Nielsen Research's Designated Market Areas ("DMAs"). DMAs are non-overlapping geographic regions which are defined by Nielsen and then ranked by the number of television

number of viewers, advertisers consider the top markets to be important (indeed even disproportionately to their subscriber numbers) for a number of reasons including product trend-setting, higher per capita disposable income, and the presence of major press. Networks that do not substantially penetrate the top markets are at a severe disadvantage in the competition for advertising dollars relative to similar networks that do. Consequently, entrants which cannot project eventual carriage to a substantial majority of top markets will not be able to attract the investment necessary to enter the marketplace.

Carriage in the top markets, or lack thereof, can also hinder a network's survival by materially impacting its ability to be reliably rated by Nielsen. Because Nielsen uses U.S. Census data to place its National People Meters (which collect ratings data), the majority of meters are located in the top DMAs.[13] Networks that are not available to a majority of Nielsen homes have a smaller population of meters from which to derive the statistically significant data upon which media buyers rely. An analysis of MVPD consolidation of top DMAs is included in Section III.B below.

III. MARKET POWER THAT EXCEEDS MARKET SHARE – TWO COMPANIES CURRENTLY CONTROL THE ENTRY AND SURVIVAL OF NEW INDEPENDENT PROGRAMMING NETWORKS.

Section II outlined two requirements for a new network to be able to enter and survive in the marketplace: the ability to forecast distribution to 50 million households over 5 to 7 years, and access to the top television markets. This Section will explain what is needed for an independent network to achieve these viability factors. In both cases,

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households contained therein. There are 210 DMAs in the U.S. The top 5 DMAs are New York, Los Angeles, Chicago, Philadelphia and Boston.

[13] Nielsen's National People Meters are dispersed according to Census data. DMA ranking is done by the number of television households. There is a positive but not perfect correlation between the percentage of total US television households in a DMA and the percentage of national people meters located therein.

and despite Congress's directive to ensure that the market structure is such that no cable operator or group of operators could unfairly impede the flow of programming to the consumer,[14] the answer is simple: carriage by Comcast and Time Warner.

Evidence suggests that carriage by Comcast and Time Warner is required for a network to reach even 25 million subscribers, despite the availability of other MVPDs in the marketplace. We explain herein why the largest cable operators' market power vastly exceeds their market share, and why strictly looking at the controlled percentage of total MVPD subscribers leads to a misinterpretation of the state of competition in the programming marketplace and the gatekeeping power wielded by two top cable MVPDs. As a result, the current ownership limits do not fulfill the Commission's objective to protect competition, market entry and ownership diversity in the programming marketplace.

A. THE 20 MILLION SUBSCRIBER THRESHOLD: WHY MARKET SHARE ANALYSIS FAILS.

Nielsen Media Research's national television ratings are the informational currency through which more than $60 billion in national and local advertising spending is placed in the U.S. each year. Nielsen compiles its data through a combination of approximately 5100 meters (carefully placed throughout the U.S. based on Census data such that the sample is a statistically accurate reflection of the total population of U.S. television households) and diaries periodically filled out by viewers. According to media analyst Larry Gerbrandt, "As a statistical sample designed to represent the viewing habits

[14] Second Further Notice at 14

of some 110 million U.S. television households, its accuracy or margin of error increases for networks that only reach a smaller percentage of all households.[15]"

Twenty million households represents a minimum distribution threshold below which Nielsen Media Research cannot provide reliable ratings (and many programming networks believe that the reliability of ratings is only guaranteed at much higher subscriber levels).[16] Networks which cannot provide advertisers with reliable ratings data are extremely limited in their ability to generate ad revenue and will not survive in the market very long. (As reference, 20 million households represents 21.6% of the total multichannel universe.[17])

What does it take for a network to reach this critical milestone? We found 92 national, non-premium cable programming networks that have succeeded in reaching the critical 20 million household milestone.[18] Findings are attached to this document as Exhibit 2 and show extreme market power in the hands of Comcast and Time Warner, including:

- Of the 92 cable networks identified, <u>not a single one had achieved the 20 million household milestone without carriage by either Comcast or Time Warner</u>, or both.

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[15] See comments to MB Docket 04-207 by TV One, Decl. of Larry D. Gerbrandt at 4-11.
[16] See comments to MB Docket 04-207. *Oxygen Media Corporation* at 4: "Nielsen will rate a network with 20 to 25 million subscribers, but the ratings data are unstable and of little use until the network reaches 45 to 50 million subscribers." *GSN* at 3: "A network needs at least 25 million subscribers just to be included in the Nielsen ratings, and, at that level, any ratings data are likely to be subsumed within Nielsen's margin of error. While a few advertisers might be willing to take a chance on a new programming network, it is all but impossible to sell meaningful national advertising at that subscribership level."
[17] Kagan Research estimates that there are approximately 92.6 million multichannel households in the United States.Kagan Media Money. April 26, 2005 at 7. Multichannel households is herein defined as any household which receives television programming from an MVPD.
[18] The analysis focused exclusively on national, non premium, linear cable programming networks. Networks which are predominantly offered as a premium service (either individually or as part of a specialized tier) were excluded, as were networks which derive all or part of their distribution through broadcast means. <u>Sources and Limitations</u>: The analysis is based on, and limited by, publicly available data. Subscriber counts are predominantly as of December 31, 2004 or more recent data when reliably available. Sources include Kagan Cable Program Investor February 28, 2005, as well as the NCTA website, corporate information, and industry trade articles.

- Of the 92 networks, there were (at the time of the research) only three cable networks which were carried by one of the two but not the other: NFL Network, and TV One (partially owned by Comcast), were both carried by Comcast but not Time Warner; and the Inspiration Network (a donor supported religious channel) was carried by Time Warner but not Comcast.

- On June 22, 2005, Time Warner Cable announced it is adding TV One (owned substantially by Comcast) to its digital line-up in Houston, Charlotte and parts of Ohio.[19] As a result, there are now only two cable networks which have surpassed the 20 million subscriber threshold with carriage by only one of the two largest MSOs: NFL Network, and Inspiration Network. Among the 92 networks, these two networks rank as # 87 and # 89 in terms of subscriber count.

- All of the cable networks with distribution to 25 million households or more were carried by both Comcast and Time Warner.

This empirical evidence demonstrates that carriage by either Comcast or Time Warner is required for a programming network to reach the critical 20 million subscriber threshold necessary for reliable Nielsen ratings. Carriage by both Comcast and Time Warner is required for a network to exceed 25 million subscribers.

These findings are real, and override a strict market share analysis. Kagan Research estimates that there are approximately 92.6 million multichannel households in the United States.[20] According to their joint filing for the Adelphia Transactions (MB Docket 05-192), Comcast currently has an attributable interest in cable systems serving 26.1 million customers[21] and Time Warner Cable currently has an attributable interest in cable systems serving 13.1 million customers.[22] Therefore, an "open field" of 53.4 million subscribers currently exists from which cable programming networks could theoretically reach these minimum distribution thresholds without carriage by either

[19] Broadcasting & Cable 6/22/2005 *Time Warner Systems Add TV One* by John Eggerton
[20] Kagan Media Money. April 26, 2005 at 7. Multichannel households is herein defined as any household which receives television programming from an MVPD.
[21] MB Docket 05-192. Application 05-18-2005 at Exhibit Z.
[22] MB Docket 05-192. Application 05-18-2005 at 9-10

Comcast or Time Warner (and the open field for networks only denied carriage by one of the two is much higher). <u>The fact is, however, that it has not happened.</u>

The 20 million subscriber threshold analysis presented above shows that as a practical matter, networks cannot reach even 25 million households without carriage by both Time Warner and Comcast. This is related to the larger issue of network survival and profitability. When it comes to pure subscriber counts (and as asserted in this Comment there are other key factors such as top market access) investors focus on an ad-supported network's ability to reach 50 million subscribers (see Section II above). They view carriage on Comcast and Time Warner as crucial indicators of a network's ability to achieve this viability threshold, and with good reason. With the "open field" of only 53.4 million subscribers[23] a network which is denied carriage by both Comcast and Time Warner would have to be carried by virtually every other MVPD, and on each MVPD's most widely distributed tier (i.e. basic analog) in order to reach that critical threshold. Not only is this virtually impossible, but denial of access at Comcast and Time Warner has spillover effect on other distributors' decisions.[24]

Like institutional investors, the MVPD community understands the vital role that Time Warner and Comcast play in a network's survival. A network that is denied carriage by both Time Warner and Comcast cannot be economically viable in the long term, and as will be shown below, the dominance of top television markets and the high

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[23] 92.6 million multichannel households (as reported in Kagan Media Money April 26, 2005 at 7) minus 26.1 million attributable to Comcast (MB docket 05-192 Application 05-18-2005, Exhibit Z) minus 13.1 million attributable to TWC (MB docket 05-192 Application 05-18-2005,at 9-10)

[24] The Adelphia Transactions will exacerbate the problem. Instead of being *virtually* impossible for a network to reach the 50 million subscriber threshold without carriage by either Time Warner or Comcast, the Adelphia Transactions would create a situation in which it will be *mathematically* impossible: only 49.2 million MVPD households will be available to new networks which have been denied carriage by both of these MSOs.[24] Even carriage by every other MVPD on analog basic (an impossible achievement to be sure) would barely enable a network to achieve a key threshold, if at all.

correlation between the carriage decisions of Comcast and Time Warner suggests that denial of carriage by *either* Time Warner or Comcast may very well constitute a death sentence for a new network. Other cable operators are therefore hesitant to dedicate the channel capacity, marketing and other resources necessary to distribute a product from a programmer whose survivability is uncertain. Thus, if Comcast and/or Time Warner decline to permit access to a new independent network, there is strong disincentive for other cable systems, and for competitors, to do so – as they know the survivability of such a network is in doubt. No cable network has been able to reach even 20 million households (21.6% of the multichannel universe) solely through the carriage of other MVPDs. **Despite ample subscribers available in an "open field," it is the carriage decisions of two companies which effectively dictate the survival or failure of programming networks, or indeed whether a new, independent network can enter and compete in the marketplace at all.**

B. CONTROL OF THE TOP DMAs: HOW FEWER SUBS CAN STILL MEAN MORE MARKET POWER

As noted in the Second Further Notice, DBS operator DirecTV currently has a larger total subscriber base than Time Warner.[25] Yet carriage by DirecTV does not have the same impact on network survival. As discussed below, this has to do with the second viability factor, the dominance of top television markets by cable operators.

The geographic dispersion of a network's subscriber base has a material impact on that network's advertising revenue (see Section II above). Specifically, networks that do not substantially penetrate the top markets are at a severe disadvantage in the competition for advertising dollars relative to similar networks that do. Consequently,

[25] Second Further Notice at ¶¶ 52

entrants which cannot project eventual carriage to a substantial majority of top markets will not be able to attract investment necessary to enter the marketplace.

What does it take to gain access to these top markets? As part of its analysis of the Adelphia transactions[26] We reviewed the Top 50 DMAs and found that Comcast and Time Warner controlled a disproportionate share of these markets and their subscribers, and will control and even greater share once the Adelphia Transactions have been completed. For example, post Adelphia transactions, there will only be two DMAs in the top 40 in which neither Comcast nor Time Warner have a presence; and one of the two MSOs will control a majority of multichannel subscribers in at least 23 and perhaps as many as 29 of the top 50 DMAs. This research was presented in its entirety in our Petition in MB Docket 05-192 and we include it in this proceeding by reference.[27]

As directed by Section 613(f)(2)(C) of the Act, the Commission must, "take particular account of the market structure, ownership patterns, and other relationships of the cable television industry, including the nature and market power of the local franchise…"[28] The dominance by two providers of so many of the nation's top television markets, shown below, is an "ownership pattern" with grave consequences for independent networks, competition, consumer choice and pricing, and the diversity of ideas in the marketplace.

This regional dominance in top markets is something which <u>is not replicated by DBS providers</u> who may have substantial subscriber totals, but as a result of their national dispersion do not share Comcast's and Time Warner's gate-keeping ability with

[26] See MB Docket 05-192, Application by Comcast, Time Warner and Adelphia
[27] See MB Docket 05-192, Comments by The America Channel at 29-33
[28] *Second Further Notice* at 22

respect to top markets. A recent Wall Street Journal article about Fox News' long awaited business news channel highlighted this reality.[29] The article states,

> "In addition to launching the new channel on cable, News Corp. also plans to make it available on its own majority-owned DirecTV satellite service, which has 14 million subscribers. But people familiar with the situation say Mr.[Rupert] Murdoch didn't want to go ahead until he had an agreement with Time Warner Cable, because it controls the crucial Manhattan market."

In fairness, this is a business news channel and therefore Manhattan (with its concentration of traders and analysts) is a particularly important market. However, the Wall Street Journal article also identifies the concentration of advertising and media executives as factors establishing Manhattan's importance, and as previously stated in this document, the high concentration of Nielsen meters and Manhattan's importance to national advertisers make the market a must-have for most advertising supported networks. If, despite all of its leverage in the marketplace and ownership of DirecTV's 14 million subscribers, vertically integrated media giant News Corp. is determining whether to launch a new programming service based on carriage with Time Warner Cable in a specific DMA, it is not unreasonable that an independent would be forced to do the same.

As shown in Sections III.A and III.B above, Comcast and Time Warner can prevent access to critical thresholds of subscribers and key advertising markets, which in turn denies independent networks the path to profitability required for initial investment from venture capitalists and carriage by other MVPDs. *CableWORLD* reported on the venture capital community's views regarding this very

[29] The Wall Street Journal. *Fox Quietly Gears Up Its Business Channel to Challenge CNBC.* Julia Angwin. June 20, 2005.

phenomenon.[30] The article is attached to this filing as Exhibit 3. Following are some relevant quotes:

> "**VCs are holding back. Their No. 1 hurdle: Any cable-related venture that seeks funding must have a deal in place with Comcast or Time Warner Cable. If one or both multi-system operators isn't on board, kiss the capital goodbye**."
>
> "**If you're selling into the cable space and you're not selling this in with one of those guys, you don't have a business**," says Alan Beasley, a partner in Redpoint Ventures, a Silicon Valley venture capital firm with stakes in BigBand Networks (bandwidth expansion), Entropic Communications (chips) and Meta TV (ITV software). "We've gotten to know **Comcast and Time Warner** very well, **along with Cox, and it would be very unlikely for us to enter into a cable venture without their support**."
>
> **Sure, there are other big MSOs and plenty of small or midsize operators** VCs could approach with a promising enterprise. "**The problem is, so many of the other MSOs wait until [they see] what Comcast or Time Warner does.** So that creates a problem," says Gary Lauder, who runs Lauder Partners, a California-based VC firm with a long track record in cable investment.
>
> **Venture capitalists also haven't seen much evidence of MSOs embracing new, independent ventures, whether tech or content, Lauder says. "There was a time when cable operators were willing to buy products from small companies**," he says. "There was more willingness to take risks with small companies. That's not the attitude these days."
>
> "**If you want to be attractive to VCs, you have to go back to the old days of cable and get the operators to make it a better entry environment for entrepreneurs**."

In a *Broadcasting & Cable* interview, John Malone, CEO of Liberty Media, summarized the market in the following way: "*Basically, the consolidation of the business has got to the point where I don't believe that an independent programmer has any chance whatsoever of doing anything unless he's heavily invested in and supported by one of the major distributors…there's no way on earth that you can be successful in the U.S. distributing a channel that Brian Roberts [the CEO of Comcast] doesn't carry,*

[30] *How Come Vultures Don't Flock to Cable*. CableWORLD. April 5, 2005. Simon Applebaum.

particularly if he has one that competes with it."[31] Excerpts from the interview with Mr. Malone are included as Exhibit 4.

In using an open field approach to establish the current 30% horizontal limit, the Commission assumed that so long as there were at least four MVPDs in the market, networks not endorsed by the largest, or even the two largest MVPDs, could still reach what the Commission perceived at the time was a viability threshold.[32] The implication was that a denial of carriage by the two largest MVPDs would have no impact on the carriage decisions of others in the marketplace.

Unfortunately, language in the Second Further Notice suggests that the Commission is not yet prepared to consider the interconnectivity of carriage decisions on ownership limits. In it the Commission states that one goal is "to ensure that a programmer denied carriage by the largest operator could nevertheless survive in the marketplace if it gained carriage on all remaining MVPDs."[33] Again, this type of strict market share analysis assumes that MVPDs are somehow not influenced by the carriage decisions of Comcast which can prevent network access to 26 million subscribers and has a presence (even without Adelphia) in 18 of the top 20 DMAs and 31 of the top 50 DMAs.

Market power and market foreclosure are not determined solely by an open field. They are determined by an MVPD's ability to prevent a network from credibly forecasting distribution to 50 million subscribers and the top television markets, as well as the influence that that foreclosure will have on the carriage decisions of other MVPDs in the marketplace. While neither Comcast nor Time

[31] Broadcasting & Cable. April 4, 2005. *From Darth Vader to Yoda*. Mark Robichaux
[32] Second Further Notice at 41
[33] Second Further Notice, ¶¶ 80

Warner can individually block access to the needed 50 million subscribers, the two (as is demonstrated below) are nearly uniform in their carriage decisions with respect to top networks, and their rejection of a network discourages other MVPDs from granting carriage to that network. The result has been shown empirically: that cable networks cannot reach even 25 million subscribers without carriage from both Comcast and Time Warner.

If the Commission's aim is indeed to provide, "competition sufficient to provide alternative means for programmers viably to reach consumer, thus protecting consumer choice and welfare,"[34] it must view the marketplace in a manner which includes the experiences of those attempting to enter and survive there. Market share analysis is not sufficient to capture the multivariate nature of this environment.

We therefore urge the Commission to:

1. **Recognize 50 million subscribers as a key viability threshold for networks,**

2. **Fully incorporate a DMA analysis into its evaluation of ownership limits, and**

3. **Recognize the effects that the decisions of the top cable operators have on other cable MVPDs.**

IV. JOINT ACTION: THERE IS A HIGH CORRELATION BETWEEN THE CARRIAGE DECISIONS OF COMCAST AND TIME WARNER WITH RESPECT TO SUCCESSFUL NETWORKS

As part of these proceedings, the Commission seeks to understand the existence of or potential for Joint Action among MVPDs. The Commission correctly notes that an explicit agreement among firms in a given market may not be necessary for that market to be characterized by joint action and refers to "conscious parallelism" as a coordinated

[34] Second Further Notice at 19

behavior which "can arise without any explicit agreement among firms, but simply as the result of a rational calculation by each firm of the consequences of its actions for competing firms…"

The analysis of cable networks that have achieved distribution to at least 20 million households, presented in Section III above, indicates that there is a high correlation between the carriage decisions of Comcast and Time Warner with respect to top networks. 90 of the 92 cable networks which we observed to have reached 20 million subscribers are carried by both Time Warner and Comcast. Further, not a single cable network has been able to surpass 25 million subscribers without carriage by both Time Warner and Comcast. With a 53.4 million subscriber "open field," this need not be the case.

The data supports the following hypotheses: (1) if one of these two MSOs agrees to broadly carry a network, the other one is likely to carry it as well; and (2) conversely, if one of the two denies carriage to a network, it is likely that the other will also deny carriage to that network and the network will never reach 20 million households.

Events of recent weeks confirm the continuation of this practice: Time Warner announced carriage of TV One[35] (a network substantially owned and already carried by Comcast), and Comcast announced carriage of LOGO[36] (a network already carried by Time Warner and owned by Viacom).

In Section III above, we also noted a "spillover effect" of denial of carriage by large MVPDs on the rest of the distribution community. We believe that other MVPDs understand that carriage by both Time Warner and Comcast is required for a network's

[35] Broadcasting & Cable 6/22/2005 *Time Warner Systems Add TV One* by John Eggerton
[36] Multichannel News. *Comcast on Board with Logo.* by Linda Moss. July 1, 2005.

long term viability and hence are reluctant to carry a network which is not also carried by these two MSOs. That no cable network has been able to reach more than 20 million households solely through the carriage of other MVPDs strongly suggests the interconnectivity of carriage decisions among MVPDs and further supports the assumption that each of Time Warner and Comcast can act individually to prevent an independent network from reaching viability, thereby limiting competition in the marketplace. The proposed absorption of a large MVPD (Adelphia) into Comcast and Time Warner will likely result in further coordinated effect.

V. COMPETITION FROM DBS AND OTHER MVPDS DOES NOT IMPACT THE CARRIAGE DECISIONS OF COMCAST AND TIME WARNER WITH REGARD TO INDEPENDENT NETWORKS.

The Second Further Notice states that the *Time Warner II* court "admonished the Commission that market share does not necessarily equate with market power." The Commission further explains that the court was suggesting that despite market share, an MVPD's power may be reduced by the presence of DBS competition or by consumer demand for programming.[37] The market power wielded by the two leading cable operators *exceeds* their market share, especially in their ability to impede the flow of independent programming to the consumer. DBS and other MVPD competition is not an effective mechanism for ensuring the entry of competition into the programming market, and despite Cablevision's suggestion to the contrary, does not negate the need for horizontal and vertical ownership limits.[38]

Our research of 92 cable networks introduced in Section III.A above shows that carriage by Comcast or Time Warner is required for networks to reach 20 million homes

[37] *2nd Further Notice* at 41
[38] Id. at 72

and carriage by both Comcast and Time Warner is required to reach the viability threshold of 50 million homes. In fact, the research suggests that a cable network cannot reach even 25 million subscribers – in itself an unsustainable plateau for an advertising supported network – without carriage by both Comcast and Time Warner.

Importantly, DBS carriage was not similarly required for a network to reach these key distribution thresholds, nor was a network able to replace a denial of carriage by Comcast or Time Warner with DBS carriage and still achieve 25 million subscribers. For advertisers, the national dispersion of DBS customers reduces the importance of DBS carriage, as DBS carriage cannot deliver the key markets that cable carriage by Comcast and Time Warner can. This reality was underscored by Rupert Murdoch's reluctance to launch a new Fox News spinoff without a carriage deal by Time Warner for Manhattan. Even with his 14 million DirecTV subs, Mr. Murdoch would not launch the network without a Time Warner deal.

As explained, other MVPDs are reluctant to dedicate the channel capacity, marketing and other resources necessary to distribute a product from a programmer whose survivability they know is uncertain. The industry is aware that denial of carriage by Comcast and Time Warner almost certainly means the death of an independent network.

Existing networks with established and loyal fan bases ready to switch MVPDs in order to view the network may be able to benefit from MVPD competition. However, with few exceptions, a new network requires carriage in order to create such a fan base. Therefore, the threat of a <u>new</u> network going to a DBS competitor does <u>not</u> induce carriage from Comcast or Time Warner, especially as they know the network will likely not secure funding or other carriage commitments in the absence of carriage from the top two cable operators.

What does propel MVPDs to carry a new network if it is not DBS competition? From our research the answer appears to be affiliation with a major media company.

VI. LARGE CABLE OPERATORS SYSTEMATICALLY FAVOR AFFILIATED OVER NON AFFILIATED PROGRAMMING

Section III demonstrated that a few large, vertically integrated MVPDs have the *ability* to restrict competition and impede the flow of programming to the consumer. This section addresses their strong *economic and competitive incentive* to do so, and notes a track record which demonstrates that networks affiliated with MVPDs and major broadcasters are routinely favored over those which are independently owned.

These interests and behaviors create for independent networks a "perfect storm" in which the sole companies endowed with the power to bestow viability on an independent network have a growing stake in preventing the additional competition from reaching the marketplace.

A. INCENTIVES TO FAVOR AFFILIATED NETWORKS

Vertically integrated media companies have a strong disincentive to embrace new networks. New independent networks are competitors. They compete directly with operator-owned networks on several levels: competition for viewers, competition for advertising dollars (including in local markets), and competition for channel capacity. And, cable operators know that a fully distributed network is frequently worth billions of dollars in asset value – and such value in the hands of independent persons or groups is foregone value to an operator. When it comes to other conglomerates retransmission consent may level the bargaining power between network and distributor. In the case of independently owned networks, no such leveling mechanism exists, and there are no safeguards to ensure that independent programmers will not be foreclosed from the marketplace. With rare exceptions,[39] a new independent network has little leverage.

One way to protect the value of their own programming assets, would be for vertically integrated MVPDs to deny linear carriage to potential independent programming competitors, in favor of their own networks an those affiliated with other major media companies who evidently either have the leverage to secure carriage, or have the ability to grant carriage to the MSO's networks in return.

B. TRACK RECORD OF PREFERENCE

Preference by MVPDs for affiliated networks over independent networks has been well documented by independent research. An analysis by the U.S. GAO showed that cable operators in general were 62% more likely to carry affiliated programming over independent programming.[40] Furthermore, of the ten variables tested in the GAO study, <u>ownership by a cable operator had by far the largest marginal effect on predicting carriage of a network.</u>[41] The GAO study concluded, "These results can also indicate the foreclosure of competition in the upstream cable network market, as independent cable networks are less likely to be carried than are affiliated networks."[42]

It should be noted as well that the GAO study uses a narrow definition of the term "affiliated," requiring majority ownership by the cable operator. Consumers Union

[39] The exceptions are networks which arrive at the carriage negotiations with a pre-existing fan base. These are typically regional sports networks such as YES network, which was able to leverage the NY Yankees' established and loyal audience.
[40] *Ownership Affiliation And The Programming Decisions Of Cable Operators.* Michael E. Clements and Amy D. Abramowitz U.S. Government Accountability Office p16.
[41] Id. at 14. Majority ownership by a cable operator added 27.78 percentage points to a network's likelihood of gaining carriage.
[42] Id. at 16

and Free Press submitted this study to the FCC in MB Docket 04-227, and stated in its cover letter, “These numbers would rise if partial ownership by an MSO or a broadcaster were also factored into the equation. If major non-broadcast media conglomerates such as Liberty Media [owners of over a dozen cable networks including Discovery Channel, Starz, and the Learning Channel, as well as substantial stakeholders in News Corporation] were not counted as “independent” in these equations, doubtless the percentages would rise even further.”[43]

The Second Further Notice asks, “What specific factors do independent networks lack that retard their ability to obtain carriage?”[44] The GAO study referenced above and our new network adoption study included below both point to a single attribute: affiliation with a large MVPD or broadcast company.

We reviewed the adoption of new affiliated and independent networks by two of the largest vertically integrated MVPDs, Comcast and Time Warner, based on publicly available information during the period of January 1, 2003 to May 15, 2005 (a nearly 2 ½-year period). [45] Only networks which sought initial launch of their programming service during the period were included in this study. [46] Results and data from this study are attached as Exhibit 5.

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[43] Liberty has since spun off its ownership of the 13 Discovery networks

[44] Second Further Notice at 35

[45] This study is limited by the availability of public announcements regarding channel launches. Sources of data: All launch dates are according to company filings with the National Cable and Telecommunications Association, as well as publicly available sources. Ownership information, subscriber data and carriage information are all from publicly available sources, including the National Telecommunications Association, industry news sources such as Multichannel News and Kagan Research, as well as corporate announcements, filings and marketing materials.

[46] Here are some key definitions of terms used in this study

- Affiliated Network: any Network with financial ties to Comcast, Time Warner, Viacom, News Corp, NBC Universal, Disney, or their subsidiaries.
- Independent Network/ Unaffiliated Network: any Network without financial ties to Comcast, Time Warner, Viacom, News Corp, NBC Universal, Disney, or their subsidiaries.

The results are stark and confirm severe dysfunctions in the cable marketplace. Ultimately these lead to higher consumer pricing, lower consumer choice, a stifling of competition and entrepreneurialism, and an adverse effect on our democracy and the diversity of ideas in the marketplace. Some highlights of the study are as follows:

<u>First, with respect to the universe of 114 independent networks seeking National carriage that the study analyzed --</u>

- One (1) out of 114 independent channels seeking national carriage, was launched on a national, non-premium (Standard) basis by Comcast. That "independent" network is the NFL Network, owned by the National Football League.
  - Comcast has issued a "hunting license" to Black Belt TV, an independent channel seeking national carriage. However as of the date of the research study, no carriage deals had been announced. It should be noted that affiliated networks are not typically given hunting licenses -- rather they are given carriage commitments.

- One (1) out of 114 independent channels seeking national carriage, was launched on a national, non-premium (Standard) basis by Time Warner. That independent network is The Sportsman Channel.

- The total percentage of independent networks seeking national carriage launched by Comcast on a Standard basis is less than one percent (0.88%).

- Six (6) out of 114 independent channels seeking national carriage, received carriage by Comcast as a Premium service, a take-rate of approximately five percent (5.26%). Premium carriage requires the subscriber to pay an additional fee to receive the network.

- The total percentage of independent networks launched by Comcast on any national basis (Premium or Standard), is six percent (6%).

- The total percentage of independent networks seeking national carriage launched by Time Warner Cable on a Standard basis is less than one percent (0.88%).

- Networks Seeking National Carriage: Any Network that is currently or would be expected to be carried on a broad basis. There are two categories of National Carriage used in this report:
  - Standard Carriage: Network is carried as a linear, non-premium service as part of a broadly distributed package.
  - Premium Carriage: Subscribers must pay an additional fee to receive the linear network, either individually or as part of a tier of channels (i.e. a sports package).
  - Networks Seeking Regional Carriage: Networks which are intended for an audience which is concentrated in one or more specific geographic regions. For purposes of this research, we considered any non-English language Network, to be a network seeking regional carriage. In addition, networks that secure regional carriage are often offered as premium services.
  - Imported Network – Network seeking regional carriage which is substantially the same as an existing foreign network.

- Four (4) out of 114 independent channels seeking national carriage, received carriage by Time Warner Cable as a Premium service, a take-rate of less than four percent (3.5%).

- The total percentage of independent networks seeking national carriage launched by Time Warner Cable on any national basis (Premium or Standard), is less than five percent (4.4%).

<u>In contrast, with respect to the 19 affiliated networks seeking National carriage that the study analyzed --</u>

- Comcast granted national carriage (Standard or Premium) to 10 out of the 19 affiliated networks seeking national carriage. This is a 53% take-rate. (Compared to 6% for unaffiliated networks.)
    - Comcast has since granted carriage to Viacom's LOGO network.[47] Therefore, Comcast has provided national carriage to 11 out of 19 affiliated networks seeking national carriage, a 58% take rate.

- Time Warner provided national carriage (Standard or Premium) to 8 out of the 19 affiliated networks seeking national carriage, a 42% take-rate. (Compared to 4.4% for unaffiliated networks.)
    - Time Warner has since announced that it will begin to carry Comcast's TV One network. The network will first be added to TWC's digital lineup in Houston, Charlotte and parts of Ohio.[48] Therefore, Time Warner has provided national carriage to 9 out of the 19 affiliated networks seeking national carriage, a 47% take rate.

- Eight (8) out of 19 affiliated networks seeking national carriage, received carriage by Comcast as a Premium service, a 42% take-rate. (Compared to 5.26% for unaffiliated networks).

- Five (5) out of 19 affiliated networks seeking national carriage, received carriage by Time Warner as a Premium service, a 26% take-rate. (Compared to 3.5% for unaffiliated networks).

<u>Across all MVPDs, affiliated networks achieved subscriber numbers considerably higher than independent networks:</u>

- The median subscriber count for the affiliated networks which received Standard carriage is eleven times (11x) greater than that of unaffiliated networks. The median subscriber count for the affiliated networks which received Standard carriage is 11 million; for the unaffiliated nets receiving Standard carriage it is 1 million.

- The mean subscriber count for the affiliated networks which received Standard carriage is more than double (2x greater) that of unaffiliated networks. The mean subscriber count for the affiliated networks which received Standard carriage is 12.67 million; for the unaffiliated nets receiving Standard carriage it is 5.7 million.

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[47] Multichannel News. *Comcast on Board with Logo.* by Linda Moss. July 1, 2005.
[48] Broadcasting & Cable 6/22/2005 *Time Warner Systems Add TV One* by John Eggerton

Not surprisingly, affiliated networks that are similar in theme to independent networks fared much better than their independent comparables in terms of carriage negotiations with Comcast and Time Warner and other MVPDs. For example:

- TV One (substantially owned by Comcast), targeted to the African-American community, launched in January 2004 and has obtained carriage agreements with both Comcast and Time Warner. It surpassed 21 million homes at break-neck speed - within 17 months (according to a June 2005 corporate press release). (In fact the Cabletelevision Advertising Bureau recently reported that TV One's subscriber count may now be as high as 29.5 million homes.) However at least five independent networks targeting African-Americans did not secure linear carriage: Africast Television Network, Black Education Network, Black Television News Channel, Black Women's TV and The Real Hip Hop Network.

- LOGO (owned by Viacom), targeted toward the gay and lesbian community, launched on June 30, 2005 to an estimated 13 million subscribers and is carried as a non-premium channel by Time Warner Cable and Comcast (as well as Adelphia, DirecTV, Charter, Cablevision and RCN). Q Television is an independent network with a similar focus. Q launched in September 2004 and has since received carriage as a premium network by RCN and minimal distribution as a premium network by Time Warner.

- SiTV and Voy both target the young, English-speaking Latin community. SiTV is owned in substantial part by Time Warner, while Voy is independent. SiTV launched in February 2004 and has received carriage deals with both Comcast and Time Warner. It is available in 10 million homes, primarily as a non-premium channel. As of the date of the research study, Voy had not received any carriage commitments.

Section 613(f)(2)(B) of the Act requires the Commission to ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems, yet this is exactly the behavior which we have observed. Examples of Comcast's disparate treatment of affiliated and independent networks include the placement of almost all of Comcast's own networks on *analog* in at least one market.[49] We reviewed Comcast's own carriage decisions with regard to Comcast-owned networks -- Among the findings:

- **100%** of Comcast's 20 networks are carried by Comcast, as *linear* networks – that is, as part of the channel line-up, not as Video on Demand.

[49] A table listing Comcast's 20 networks and details of their carriage is included in Section VII below

- Not a single one of these Comcast-owned networks is offered as a VOD-only network.
- This is in contrast with Comcast's stated position on VOD. Matt Strauss, Comcast's SVP of VOD, stated in an interview in the June 20, 2005 issue of *CableWORLD*, that, "the future of television is not going to be adding channel 343 to the digital lineup, but it's going to be to migrate more and more programming over to on demand, which really is a superior way to watch programming."
- Strauss also suggested that VOD was the correct platform on which to launch new services: "A lot of our enthusiasm about on demand, and about programming for on demand, isn't so much that there's bandwidth constraints on launching more linear channels, it's because we actually know and believe that on demand's a better viewing experience and platform, especially for new forms of content."
- We believe that Comcast's practice of launching its own networks on linear capacity – and in nearly all cases on analog -- while relegating independent networks to the vastly inferior VOD platform, is discriminatory.

- **100%** of Comcast's national networks are carried by Comcast on *analog* (excluding PBS Sprout, which has not yet launched) in at least one market.
  - CableWORLD recently reported that in anticipation of the transfer of its Los Angeles systems to Time Warner, Comcast moved its corporate-owned networks from digital to expanded basic (analog), including Style, TV One, Outdoor Life, AZN and G4. [50]

- **100%** of Comcast's seven regional networks are carried by Comcast on *analog*.

When Comcast's and Time Warner's preference for affiliated networks and behavior toward independents are considered in light of their market power illustrated in Section III, a dismal picture for independent networks emerges. It is the combination of these elements (ability to restrict competition, powerful incentive to restrict competition, and observable patterns of discrimination) within two vertically integrated MVPDs, which allows us to fully understand the reluctance of the venture capital community to invest in new independent networks, and the conclusion of John Malone that the only way for an independent network to survive in the current marketplace is to be "heavily

[50] CableWorld *Are Independents' Days Over?* June 20,2005 Shirley Brady

invested in and supported by one of the major distributors," (both cited in Section III above).

We respectfully submit that it is not the ceiling applied to vertical ownership limits that has failed to protect independent networks from discriminatory behavior by vertically integrated MVPDs, rather it is the narrow definition of "affiliated," a position also supported by Writers Guild. [51] So long as MVPDs are able to satisfy the Commission's requirements by adding networks owned by broadcast media conglomerates, they will do so at the expense of independent networks and to the detriment of diversity, competition, consumer choice and pricing. The Commission should, in the context of these proceedings, adjust its definition of affiliated networks to include those networks owned by the major broadcasters.

VII. THE IMPACT OF EXPANDED DIGITAL CAPACITY ON MARKET ENTRY

In its Second Further Notice, the Commission expresses interest in "obtaining information on existing and planned channel capacity and usage, both analog and digital, particularly with regard to the relationship between horizontal ownership and independent cable network distribution" and asks for comments on the opportunities, if any, that the increased channel capacity of cable systems provides to independent programmers seeking to launch new channels.[52]

As the Commission has suggested that capacity availability will be a factor considered in this proceeding, we believe it is fair for the Commission to require MVPDs to disclose sufficient information regarding capacity and constraints such that the

[51] Second Further Notice at 73
[52] Second Further Notice, ¶¶ 58

Commission may determine: (a) what are the digital bandwidth capabilities of the largest MVPDs on a per system basis; (b) how many digital channels can each carry today; and (c) what are these MVPDs' plans with respect to digital capacity in the future and how will the same affect access for independent networks.

We respectfully submit that the real constraint is not related to physical bandwidth, but rather to Comcast's practice of favoring carriage of affiliated networks (which is detailed in Section VI). If there were a bandwidth constraint, Comcast's own affiliated new networks would experience the same difficulty. Yet Comcast continues to make extensive use of analog and digital capacity for its affiliated networks. For example, Comcast currently carries all seven of its own national networks (and all eight of its regional networks) on *analog* platforms.[53] And when Comcast recently moved five of its affiliated channels in Los Angeles from digital to analog in advance of the system swap with Time Warner, this filled capacity equivalent to 50 digital channels (because each analog channel consumes capacity equivalent to approximately ten digital channels).[54]

Similarly, on August 5, 2005 Comcast announced that in one of its larger systems in the Chicago DMA, it was bumping NBC owned SciFi Channel off of its analog platform – despite the fact that SciFi has been "on a ratings roll," – and replacing it with Comcast owned Golf Channel. The result is to double the subscribers for Golf and to cut

[53] A table detailing Comcast's practices with respect to carriage of its own networks is included in Section X.A

[54] CableWORLD June 20, 2005. *Are Independents' Days Over?* "Comcast moved Comcast-owned networks Style, TV One, Outdoor Life, AZN and G4 from digital to expanded basic in advance of the market's pending system swap with Time Warner Cable."

in half the subscribers for SciFi for that large system (SciFi will be placed on digital basic which currently reaches only 50% of the 1.7 million households served by the system).[55]

Comcast even launches its own new networks on analog platforms, before these networks have been validated in the marketplace. For example, TV One, 33% owned by Comcast, launched on January 19, 2004. According to a *Multichannel News* article on that day, Comcast was the only MVPD to carry the channel. "Its Comcast ties aside, TV One has yet to reach affiliation deals with any other distributors, despite discussions with cable operators and DBS providers." [56] Yet despite this lack of market validation by other MVPDs and despite the fact that the network had not yet had an opportunity to generate viewership or consumer demand, Comcast granted its fledgling network analog carriage to at least 2.2 million subscribers. On the day of its commercial launch, TV One was carried on Comcast systems in Atlanta; Detroit and Flint, Mich; Washington, D.C., and Baltimore, all on analog platforms.[57] TV One has since grown at a remarkable pace, surpassing 21 million subscribers in just 17 months, in large part due to its wide carriage by Comcast systems.[58] A table detailing Comcast's practices with respect to carriage of its own networks is included in Section X.A.

In addition, many MSOs are aggressively deploying "digital simulcast." Comcast recently announced on an analyst call that it expects to have at least 75% of its markets under this program by year end.[59] With digital simulcast, cable operators transmit their entire analog lineup in both analog and digital formats. This program, intended to reduce

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[55] Multichannel News 8/5/2005 *Comcast: SciFi to Digital in Chicago*
[56] Multichannel News 01/19/2004 *Will Good Times Roll for TV One?* R. Thomas Umstead
[57] Id.
[58] Among other systems, Comcast carries TV One in Atlanta; Detroit and Flint, Mich; Washington, D.C.; Philadelphia; Baltimore; Dallas; Indianapolis; Los Angeles; Little Rock, Ark; Southeast Michigan; New Haven and Hartford, Conn.; Gary and Hammond, Ind.; Las Cruces, N.M.; Muncie, Ind.; and Augusta, Ga,
[59] Q2 2005 Comcast Corporate Earnings Conference Call 08/02/2005, recording of which is available on www.comcaast.com.

churn and increase revenue for MSOs, requires significant usage of capacity – every analog network which is simulcast in digital format uses additional capacity which could be allocated to a new network. For a typical system this is capacity equivalent to approximately 80 networks.

Section 613(f)(2)(B) of the Act directs the Commission to ensure that cable operators affiliated with video programmers "do not favor such programmers in determining carriage…" In addition, the Second Further Notice seeks to determine whether the allocation of digital and analog capacity reveals disparate treatment of independent and affiliated networks.[60] We believe that the actions of Comcast described above highlight this very pattern of preference, to the detriment of competition, consumer choice, consumer pricing and the diversity of ideas in the marketplace.

VIII. COMPETITION FROM INDEPENDENT PROGRAMMERS IS AN IMPORTANT CHECK AGAINST RATE INCREASES BY AFFILIATED PROGRAMMERS, WHICH FAVORABLY AFFECTS CONSUMER PRICING.

The practice of restricting new, independent firms from entering the marketplace increases consumer prices.

The GAO report on Competition notes a 40% increase in cable rates in the 5 years preceding the study, compared with a 12% increase in the general rate of inflation over the same period.[61] The dramatic increase of cable rates is a common complaint, and the most common response from the cable community is to cite higher license fees demanded

[60] Second Further Notice ¶¶ 58

[61] Government Accountability Office, "Issues Related to Competition and Subscriber Rates in the Cable Television Industry" October 2003. at 20

by networks. Indeed the GAO confirms that the increase in programming costs has also outpaced the general increase in inflation and is a major contributor to overall cable price increases.

One reason for this, of course, is that certain cable programming networks are "must-haves" and their differentiation puts upward pressure on the license fees that operators pay. However, removal of unreasonable barriers to entry for cheaper and more efficient independent networks -- and free competition from these networks for carriage, tier placement, channel assignments and more -- would put downward pressure on the license fees which MVPDs are required to pay. <u>The entry of new networks into the programming market and the competition which such entry brings, is likely to slow programming increases.</u> In a free market environment, independent networks that have the same opportunities of access, can cause high-priced affiliated networks to become more efficient, reduce their rates or otherwise improve their value proposition – all of which would inure to the benefit of the consumer. The continued restrictions on entry have had and will continue to have the opposite effect: continued increases in programming costs and hence, upward pressure on consumer pricing.

One of the reasons we believe that downward pressure on pricing has not occurred, is because new <u>owners</u> of programming have been precluded from entering the market. It is not the entry of one more Viacom or Time Warner network that will create this downward pressure on consumer pricing. The public has an interest in fair access for entrepreneurial ventures – independent programmers – which will expand competition in the marketplace.

IX. INDEPENDENT NETWORKS ENSURE DIVERSITY AND EXPAND COMPETITION IN THE VIDEO MARKETPLACE

In the Second Further Notice, the Commission cites an argument by AT&T, filed as part of the 2001 Further Notice, which suggests that the Commission "should not be concerned with networks' ability to enter the market, but instead should focus on program producers' ability to find outlets to distribute their programming to the public."[62] The suggestion here is that networks do not play a critical role in the development and production of original, high quality programming, and are not essential to ensuring the diversity of ideas and information in the marketplace. The Commission therefore requested comments "*generally on the role that networks play in the production and distribution of programming…*"[63]

In any marketplace, it is the preferences of the buyers which determine what goods will ultimately be created and offered by sellers. The video programming market is no different. Production companies will not invest resources to develop programming for which there is no market. It is the network, the purchaser of the content, which ultimately determines which content will be produced, who will produce it and importantly, how the production will handle the underlying subject matter. Hence, diversity is ensured by increasing the diversity of the purchasers of content, in this case, the networks.

New networks, serve several crucial roles in the programming marketplace. From an economic perspective, they can often create an entirely new market for programming of a specific genre or niche, and in doing so increase opportunities for independent producers; they also increase the number of potential buyers for more mainstream

[62] Second Further Notice at 38
[63] Second Further Notice, ¶ 66

original programming concepts and existing programs and this competition in turn promotes investment in independent production companies and leads to the creation of high quality programming. And, as discussed in Section VIII above, new independent networks can cause downward pressure on cable rates. However there is another role that new networks, particularly independently owned networks, play: they expand the editorial diversity of the industry, and expose the public to new concepts, ideas and points of view.

Large MVPDs would like the Commission to believe that the existence of a purported 196 independent networks (a number which is deconstructed below) proves diversity. But the facts demonstrate an increasingly narrow ownership structure, and a market which is becoming increasingly off-limits to independently-owned ideas. A quick look at the list of 92 networks which we observed to be distributed to more than 20 million households reveals that roughly 76% are owned in whole or part by one of six companies Disney, Viacom, NBC Universal, News Corp, Time Warner and Comcast. In addition, there are only 10 of the 92 which are not owned in whole or part by a large broadcast company or MVPD. Ownership brings control or influence over the selection of top management, who, in turn, are responsible for shaping the network's identity, both in terms of the content selected and the editorial slant of that content.

X. VOD CARRIAGE MAY BE USED TO DISCRIMINATE AGAINST INDEPENDENT NETWORKS AND IS NOT A VIABLE ALTERNATIVE TO LINEAR CARRIAGE

The Second Further Notice requests comment on the effect that VOD/SVOD may have on the opportunity for independent programmers to gain distribution of their programming.[64] We respectfully submit that it is not the opportunity to secure VOD distribution which requires the Commission's consideration in these proceedings – VOD is a vastly inferior platform with an unproven economic model. Rather scrutiny should be applied to the MSO practice of herding independent networks to VOD while retaining linear (and often analog) capacity for affiliated networks.

Comcast is not only the largest MVPD, it is also the most vocal proponent of Video on Demand distribution, particularly for new, independent networks. In a recent interview published in CableWORLD, Matt Strauss, Comcast's VP of Video On Demand Programming Investments, said that, "the future of television is not going to be adding channel 343 to the digital lineup, but it's going to be to migrate more and more programming over to on demand, which really is a superior way to watch programming."[65] He further claimed that VOD was the correct place to launch new services: "A lot of our enthusiasm about on demand, and about programming for on demand," Strauss went on to say, "isn't so much that there's bandwidth constraints on launching more linear channels, it's because we actually know and believe that on demand's a better viewing experience and platform, especially for new forms of content."

To date however the economic model for VOD-only carriage is unproven and does not approach the model for a linear network. The large cable MVPDs view VOD as primarily a secondary outlet for existing programming and continue to develop and launch linear networks. For example, 100% of Comcast's 20 networks are linear, and Comcast has granted almost all of them analog carriage on its own systems.

[64] Second Further Notice, ¶¶55
[65] CableWorld June 20, 2005

Comcast owned networks			
National Networks	Ownership %	Linear Carriage	Analog Carriage (in at least one market)
E!	61%	yes	Yes
Style	61%	yes	Yes
G4	84%	yes	Yes
Golf	100%	yes	Yes
Outdoor Life Network	100%	yes	Yes
AZN	100%	yes	Yes
TV One	33%	yes	Yes
PBS Sprout (not yet launched)	not disclosed	yes	n/a
Regional Networks			
CN8	100%	yes	Yes
Comcast SportsNet Philadelphia	78%	yes	Yes
Comcast SportsNet Chicago	30%	yes	Yes
Comcast SportsNet Mid Atlantic	100%	yes	Yes
Comcast SportsNet West	100%	yes	Yes
Comcast/Charter Sports Southeast	72%	yes	Yes
Comcast Local Detroit	100%	yes	Yes
Team-Specific Networks			
BravesVision	not disclosed	yes	No
FalconsVision	not disclosed	yes	No
Dallas Cowboys Channel	not disclosed	yes	No
High Definition Networks			
inHD	54%	yes	n/a
inHD2	54%	yes	n/a

TV One, owned in part by Comcast, was launched in January 2004 and reached 21 million subscribers in just over 17 months. As shown in the table above, TV One is a *linear* channel, with *analog* carriage on Comcast in several markets--no small feat for a new channel. Comcast's new PBS Sprout channel will launch on *linear* capacity. Other new Comcast channel initiatives, like Comcast SportsNet West, Comcast SportsNet Chicago, Comcast's New York Mets channel and Comcast's Dallas Cowboys channel, exist or are planned as *linear* channels.

XI. FALSE DIVERSITY – THE 11TH ANNUAL REPORT'S INCORRECT ASSESSMENT OF THE EXISTENCE OF "INDEPENDENT" NETWORKS

Paragraph 51 of the Second Further Notice states that "the number of national programming networks has increased dramatically in recent years," and cites as evidence the Commission's Eleventh Annual Report on Video Competition, in which it is asserted that there are 388 networks in existence and that 196 of them are "independent."[66] Comcast Corporation in its application for the Adelphia Transactions (MB Docket 05-192) as well as in ex parte filings in this proceeding since the *2001 Further Notice,* uses these numbers and those from the 10th Annual Report to argue that the quantity and quality of video programming available to consumers, as well as the source diversity and content diversity, has never been greater, and that therefore there is no evidence of current impediments to the flow of video programming to consumers.[67] We caution the Commission that these numbers do not give an accurate or adequate picture of the state of diversity, competition or consumer choice in the video programming marketplace.

The 11th Annual Report implies that in the assessment of competition and diversity in the programming market, all networks are equal regardless of their reach, and so long as there is a sufficient number of networks, diversity and competition are assured. For example, the report simply lists all networks in existence and then counts the total number of affiliated and unaffiliated networks, as if to say that an independent network which only operates a few hours per week or is accessible by less than a million subscribers somehow offsets a 24/7 affiliated network which is seen in 85 million households. By not qualifying these lists with subscriber counts or other distribution

[66] See 11th Annual Report, 20 FCC Rcd at ¶ 145, Appendix C.
[67] MB Docket 05-192, Application by Adelphia, Time Warner, and Comcast at 83, Second Further Notice at 27

information, the report falls short of providing users with information necessary to truly assess the health of competition and diversity in the video programming market.

When assessing competition and diversity in the programming market, *reach matters*; as does *platform,* for example linear carriage (which Affiliated networks secure 100% of the time) or VOD-only (where independent networks are led). A more accurate assessment of the state of the market can be made by supplementing the raw network counts with other data -- which we urge the Commission to consider in this proceeding, specifically:

(1) The number and ownership structure of cable networks which have reached the Nielsen milestone of 20 million households;

(2) The number and ownership structure of networks which are in more than 50 million households (a key threshold for national advertisers – see Section III above). We know of only five independent networks from the Commission's list of 196 that have reached this critical advertising threshold (plus two CSPAN networks)[68];

(3) The growth rate of independent networks year over year, as compared with affiliated networks. Our research into networks launched between January 2003 and May 15, 2005 (introduced in Section III below) showed that networks affiliated with MVPDs or the major broadcasters grew faster. Of those networks launching, affiliated networks achieved subscriber numbers that were 11 times greater on a median basis and more than 2 times greater on a mean basis than their independently owned counterparts; and

(4) The number of affiliated networks that failed to secure requisite carriage (at most, one, that we are aware of during the study introduced in Section VI); versus the number of independent networks that failed to secure requisite carriage (scores).

[68] The five are: The Weather Channel, Home Shopping Network, Hallmark Channel, Oxygen, and EWTN

In addition, the Eleventh Annual Report's tally of 196 independent networks includes many networks which should not be counted as independent. For example :

- VH1 MegaHits and VH Uno which are both owned by Viacom, and SiTV which is substantially owned by Time Warner, appear to be mistakenly designated as independent;
- 15 international networks for which Comcast serves as the domestic marketing and affiliate sales arm were designated as independent, despite a financial relationship with an MVPD based on securing carriage;
- Several "part time networks" which show only a few hours of programming per week were included, such as Deep Dish TV which programs 1 hour per week aired on PBS and public access channels, My Pet TV which programs only a few hours per day and appears to be distributed only to Veterinarian and Animal Shelter waiting rooms, and others;
- And several networks which identify themselves as, or in reality are, only a regional service intended for limited markets, such as Boston Kids & Family and others.

Further, when looking at the overall list of 388 national networks reported by the Commission, we count 86 which are pay-per-view or VOD channels – not linear channels – and therefore incorrectly included in the total. (Within the subset of 196 independents there were at least 48 VOD and pay per view networks which incorrectly inflated the total.) One cannot compare a linear, ad-supported MSO-owned network that is in 85 million homes, with a VOD product which occupies vastly inferior capacity.

In Section III of this filing we introduce a list of 92 national cable programming networks which have succeeded in reaching the 20 million subscribers required for Nielsen ratings, the first step toward sustainable advertising revenue.[69] These 92 networks comprise a more accurate list of which networks are actually viable (of course they also happen to be the most widely distributed networks). 80 of the 92 are affiliated with an MVPD or broadcast company.[70] 70 of the 92 are owned by at least one of the "big six" media companies (Disney, Viacom, NBC Universal, News Corp, Time Warner and Comcast).

XII. CONCLUSION

For the foregoing reasons, TAC respectfully urges the Commission to (1) maintain and enforce strict horizontal and vertical ownership limits, no higher than those previously adopted by the Commission, on MSOs, (2) strongly consider DMA concentration and other factors not captured by market share analysis in setting those limits and (3) enlarge the definition of "affiliate" in the context of vertically integrated programming. Only by taking such measures can the Commission improve subscribers' access to diverse and independent programming.

Respectfully submitted,

______// signed // ____________________________

Kathleen Wallman

[69] As explained in Section II, networks which derive all or part of their viewership from broadcast were excluded from the list, including PAX, Univision, and others.
[70] Of the remaining 12, 2 are CSPAN networks.

The America Channel, LLC
120 International Parkway Suite 220
Heathrow, FL 32746

August 8, 2005

Exhibit 1: Comments filed in MB Docket No. 04-207 regarding network viability thresholds

<u>Comments of Viacom</u>

Pg 19:

"**In addition, national advertisers often have minimum subscriber base requirements. In Viacom's experience, many national advertisers regard a minimum subscriber base of approximately 50 million households as necessary in order to reach a meaningful number of viewers**."

<u>Comments of Crown Media Holdings:</u>

Pg 6:

"Although the Commission has suggested that programming services may survive with a subscriber base of 15 to 20 million subscribers, that is inconsistent with Crown Media's experience in today's marketplace. With nearly 26 million full- and part-time subscribers, the performance of the Hallmark Channel's predecessor was stagnant and its financial prospects were dim. Although Nielsen may rate a programming service with 20 million subscribers, few advertisers will buy advertising and the cost per thousand rates generally are not competitive. Advertisers are interested in such networks only if they are emerging, i.e. their distribution is steadily and rapidly increasing.

"**The Hallmark Channel's experience suggests that the more realistic plateau for meaningful advertising revenues is now approaching 50 to 60 million subscribers. Subscribers to Hallmark Channel more than doubled from 2000 to 2003 with distribution topping 56 million in 2003. As a result of that growth, coupled with improved ratings, advertising revenues increased by more than four times, with the largest percentage increase in advertising revenues occurring when distribution approached 56 million and more subscribers.** Crown Media is projecting that an approximate increase in subscribers of 20% from 2003 to 2004, coupled with a further improvement in ratings, will yield more than a 70% increase in advertising revenues. **Thus, these data support the conclusion that substantially greater advertising revenues are available to programming services with 50 to 60 million subscribers -- a level of subscribership associated with a viable broad-based entertainment programming network in today's competitive marketplace."**

<u>Comments of GSN – The Network for Games</u>

Pgs 3-4.

"According to recent Nielsen Universe Estimates of programming network distribution, the 50th-ranked program service today is National Geographic Channel, which has more than 50 million subscribers. Thus, the notion that an advertiser-supported cable programming network can survive in today's world with only 15 to 20 million subscribers is long out of date. **A stand-alone network (i.e. one that is not affiliated**

with a broadcast network or a major cable multiple system operator) has virtually no chance to gain significant advertising revenue with only 15 to 20 million subscribers. A network needs at least 25 million subscribers just to be included in the Nielsen ratings, and, at that level, any ratings data are likely to be subsumed within Nielsen's margin of error. While a few advertisers might be willing to take a chance on a new programming network, it is all but impossible to sell meaningful national advertising at that subscribership level.

"**Currently, 50 million subscribers is the approximate threshold for achieving meaningful national advertising revenues, a level of distribution which GSN's experience demonstrably confirms. Between 2002 and 2003, GSN increased its distribution from 43 million subscribers to over 50 million, an increase of approximately 16 percent. During that same period, however, GSN's general rate advertising revenues more than doubled,** and they are on track to double again this year. **The number of national advertisers buying time on GSN also increased substantially -- nearly doubling during the period after GSN passed the 50 million subscriber mark.** GSN continues to plow these revenues back into the acquisition and development of new programming to improve its service and gain additional distribution, as well as community outreach programs like GSN's "Get Schooled" game tour, through which hundreds of thousands of dollars have been contributed to the college savings funds of students in 15 to 20 different cities. **Even at the 50 million subscriber level, a network must be able to demonstrate that its distribution is growing, and advertisers will quickly abandon a network that is losing distribution. Many advertisers will not even meet with a network that has less than 50 million subscribers."**

<u>Comments of A&E Television Networks</u>

Pg 13-14.

The importance of bundling in amassing sufficient potential viewers to launch or sustain a multichannel network cannot be overstated. In AETN's experience, distribution fees alone are insufficient as a revenue stream, but rather must be complemented by advertising dollars, for a multichannel network to pay for high-quality programming, the lifeblood of its existence. **A multichannel network must be able to show it reaches at least forty million subscribers before it can reasonably expect to attract significant advertising revenue. In order to attract sufficient advertising revenue to afford to pay for and provide a meaningful quantity of original programming, the network must reach approximately sixty million subscribers. Thus, a network has to reach tens of millions of subscribers before it attains a level where it can pay for unique programming, which helps increase the viewership, which in turn leads to advertising dollars that allow the network to bring something new to the market.**

<u>Comments by Oxygen Media Corporation</u>

Pg 4:

"**Nielsen will rate a network with 20 to 25 million subscribers, but the ratings data are unstable and of little use until the network reaches 45 to 50 million subscribers.**

Oxygen did not become “rated” until April 2003. For the first several years of our existence, Oxygen was not included in the Nielsen Daily ratings. During that period, we provided prospective advertisers with monthly or weekly ratings data, making it more difficult to sell advertising. Although it is very expensive for an independent programming network to subscribe to the Nielsen Daily rating service, Oxygen now does so because, among other things, media buyers rely heavily on these data.”

Comments of Bloomberg Television

Pg 5:

“[G]iven the relatively limited level of distribution, BTV can command only modest license fees from its distributors and advertising fees from its advertisers. **BTV’s expectation is that once the service reaches 40 million subscribers it will be able to generate higher affiliate and advertising fees to sustain the service over the long-term.”**

Comments of TV One

Declaration of Larry Gerbrandt, media expert and former Sr. Analyst at Kagan Research

Pg 6::

“…[A]dvertising revenue only becomes viable (for reasons discussed in more detail below) at somewhere above the 20 million subscriber level. **In practice, because of the number of networks competing in the market, advertising does not become a self-sustaining revenue stream—where a combination of advertising and affiliate fees exceeds operating, marketing and programming expenses--until a network reaches 40 million or more households**.”

Pg 7: “…At the same time, advertisers base the majority of their buying decisions on ratings. Nielsen Media Research is the sole source of ratings domestically. It compiles its data through a combination of meters (around 5,000 hooked to a demographically balanced sample nationwide) and diaries periodically filled out by viewers. As a statistical sample designed to represent the viewing habits of some 110 million U.S. television households, its accuracy or margin of error increases for networks that only reach a smaller percentage of all households. While it is possible for a network to get ratings indications with as few as 10 million-15 million subscribers, this means that it will be based (assuming a perfect demographic distribution) on as few as 500 meters, or a 10% subset of the total Nielsen meter sample group. **The more distribution a network receives, the greater the reliability and accuracy of the Nielsen audience measurement system. Conversely, emerging networks are often launched in a rolling manner market-by-market across the country, and it may take several years before they gain carriage in the major TV markets in which most of the Nielsen meters are concentrated**.”

Exhibit 2: Networks distributed to 20 million households.

The following list ranks 92 national, non-premium cable programming networks by their distribution. Networks which are owned in part or whole by an MVPD or one of the four major broadcasters (Disney, News Corp, NBC Universal, Viacom) are marked as Affiliated. Networks carried by Comcast and Time Warner are thus marked.

The analysis focused exclusively on national, non premium, linear cable programming networks. Networks which are predominantly offered as a premium service (either individually or as part of a specialized tier) were excluded, as were networks which derive all or part of their distribution through broadcast means including PAX, Univision, TBS, WGN and others.

Rank	Network	Ownership	Affiliated? 1=yes	Subs (millions)	Carried by Comcast	Carried by TWC
1	**Discovery**	Liberty Media, Cox, Advance Newhouse	1	**89.4**	1	1
2	**ESPN**	Disney	1	**89.1**	1	1
3	**CNN**	Time Warner	1	**88.8**	1	1
4	**TNT**	Time Warner	1	**88.8**	1	1
5	**USA Network**	NBC Universal	1	**88.7**	1	1
6	**Nickelodeon**	Viacom	1	**88.6**	1	1
7	**A&E Network**	Disney, NBC Universal, Hearst	1	**88.4**	1	1
8	**C-SPAN**	National Cable Satellite Corp	*	**88.4**	1	1
9	**Lifetime Television**	Disney, Hearst	1	**88.3**	1	1
10	**Spike TV**	Viacom	1	**88.2**	1	1
11	**ESPN2**	Disney	1	**88.1**	1	1
12	**The Weather Channel**	Landmark Communications		**88.1**	1	1
13	**TLC**	Liberty Media, Cox, Advance Newhouse	1	**88.0**	1	1
14	**ABC Family Channel**	Disney	1	**87.7**	1	1
15	**Headline News**	Time Warner	1	**87.6**	1	1
16	**MTV (Music Television)**	Viacom	1	**87.6**	1	1
17	**QVC**	Liberty Media	1	**87.5**	1	1
18	**Home & Garden Television**	Scripps		**87.4**	1	1
19	**The History Channel**	Disney, NBC Universal, Hearst	1	**87.4**	1	1
20	**Cartoon Network**	Time Warner	1	**87.1**	1	1
21	**CNBC**	NBC Universal	1	**87.1**	1	1
22	**VH1**	Viacom	1	**86.9**	1	1
23	**Fox News**	News Corp	1	**86.6**	1	1
24	**AMC**	Cablevision	1	**86.4**	1	1
25	**Animal Planet**	Liberty Media, Cox, Advance Newhouse	1	**86.4**	1	1
26	**Comedy Central**	Viacom	1	**86.4**	1	1
27	**Food**	Scripps		**85.9**	1	1
28	**E!**	Comcast	1	**85.6**	1	1
29	**HSN**	Interactive Corp.		**85.5**	1	1

30	**Disney**	Disney	1	**85.1**	1	1
31	**FX**	News Corp	1	**85.1**	1	1
32	**TV Land**	Viacom	1	**85.0**	1	1
33	**Sci Fi**	NBC Universal	1	**84.3**	1	1
34	**MSNBC**	NBC Universal	1	**83.2**	1	1
35	**Court TV**	Time Warner & Liberty Media	1	**82.5**	1	1
36	**BET**	Viacom	1	**79.5**	1	1
37	**Bravo**	NBC Universal	1	**77.8**	1	1
38	**Travel**	Liberty Media, Cox, Advance Newhouse	1	**77.7**	1	1
39	**TV Guide**	News Corp	1	**76.7**	1	1
40	**CMT**	Viacom	1	**76.6**	1	1
41	**Fox Sports**	News Corp	1	**75.5**	1	1
42	**C-Span II**	National Cable Satellite Corporation	*	**74.7**	1	1
43	**TCM**	Time Warner	1	**70.1**	1	1
44	**Hallmark**	Crown Media		**67.2**	1	1
45	**Golf**	Comcast	1	**66.9**	1	1
46	**Speed**	News Corp	1	**63.4**	1	1
47	**Outdoor Life**	Comcast	1	**61.6**	1	1
48	**Shop NBC**	NBC Universal	1	**59.4**	1	1
49	**GSN**	Liberty Media	1	**56.6**	1	1
50	**Discovery Health**	Liberty Media, Cox, Advance Newhouse	1	**55.6**	1	1
51	**ESPN Classic**	Disney	1	**55.5**	1	1
52	**WE**	Cablevision	1	**55.2**	1	1
53	**MTV2**	Viacom	1	**54.6**	1	1
54	**Oxygen**	Oxygen		**54.0**	1	1
55	**EWTN**	Independent		**53.0**	1	1
56	**National Geographic**	News Corp	1	**51.9**	1	1
57	**G4**	Comcast	1	**49.8**	1	1
58	**Toon Disney**	Disney	1	**47.9**	1	1
59	**LMN (Lifetime Movie Network)**	Disney, Hearst	1	**43.7**	1	1
60	**ESPNews**	Disney	1	**43.2**	1	1
61	**Noggin**	Viacom	1	**42.5**	1	1
62	**BBC America**	Liberty Media, Cox, Advance Newhouse	1	**41.4**	1	1
63	**SoapNet**	Disney	1	**40.3**	1	1
64	**Galavision**	Univision		**40.0**	1	1
65	**Style!**	Comcast	1	**40.0**	1	1
66	**Discovery Kids**	Liberty Media, Cox, Advance Newhouse	1	**37.6**	1	1
67	**Science**	Liberty Media, Cox, Advance Newhouse	1	**37.3**	1	1
68	**Fuse**	Cablevision	1	**36.8**	1	1
69	**Great American Country**	Scripps		**36.8**	1	1
70	**Military Channel (formerly Discovery Wings)**	Liberty Media, Cox, Advance Newhouse	1	**36.0**	1	1
71	**Discovery Home**	Liberty Media, Cox, Advance Newhouse	1	**35.7**	1	1

72	**Discovery Times**	Liberty Media, Cox, Advance Newhouse	1	**35.7**	1	1
73	**FitTV**	Liberty Media, Cox, Advance Newhouse	1	**35.4**	1	1
74	**VH1 Classic**	Viacom	1	**35.4**	1	1
75	**The Word**	Independent		**35.0**	1	1
76	**Bloomberg TV**	Bloomberg		**34.1**	1	1
77	**Independent Film**	Cablevision	1	**33.6**	1	1
78	**NickToons**	Viacom	1	**32.5**	1	1
79	**Nick Too (Nick2)**	Viacom	1	**32.3**	1	1
80	**Biography**	Disney, NBC Universal, Hearst	1	**31.4**	1	1
81	**History International**	Disney, NBC Universal, Hearst	1	**31.1**	1	1
82	**DIY**	Scripps		**31.0**	1	1
83	**FMC**	News Corp	1	**28.4**	1	1
84	**Nick GAS**	Viacom	1	**25.8**	1	1
85	**Fine Living**	Scripps		**25.6**	1	1
86	**Outdoor Channel**	Independent		**24.8**	1	1
87	**NFL Network**	NFL		**24.0**	1	**0**
88	**CNBC World**	NBC Universal	1	**22.0**	1	1
89	**INSP (Inspiration Network)**	Independent		**21.3**	**0**	1
90	**Fox Soccer**	News Corp	1	**20.0**	1	1
91	**Sundance Channel**	Viacom, NBC Universal, and others	1	**20.0**	1	1
92	**TV One****	Comcast	1	**20.0**	1	**0****

*The National Cable Satellite Corporation (C-SPAN) derives 97 percent of its revenues from affiliate fees (*i.e.*, subscriber fees from MVPDs). The remaining three percent is provided by various investments.

**TV One, at the time of the research was not carried by Time Warner, it since has been added to TWC systems.

Sources and Limitations: The analysis is based on, and limited by, publicly available data. Subscriber counts are predominantly as of December 31, 2004 or more recent data when reliably available. Sources include Kagan Cable Program Investor February 28, 2005, as well as the NCTA website, corporate information, and industry trade articles.

Exhibit 3: CableWORLD article, April 4, 2005: How Come the Vultures Don’t Flock to Cable?

How Come the Vultures Don’t Flock to Cable?

Venture capitalists can't find the key to unlock sound cable investments--stalling innovation and blunting cable's edge.

By Simon Applebaum April 4, 2005

A few hundred venture capitalists, largely from San Francisco and nearby Silicon Valley, will visit the Moscone Center this week during the National Show. In one sense, they are the most important people attending the show.

Their stock in trade: getting businesses, and sometimes entire industries, off the ground with their investments. They--along with the billions they marshal--can launch technology or programming that can sharpen cable's competitive edge against DBS, telcos and other electronic media rivals.

Will they invest in cable-related ventures at the same volume they invest in other business sectors? It's an open question, and the odds right now don't look favorable where the cable industry is concerned. The general attitude among venture capital executives reached for this article is that investment in new cable-related ventures will be the exception, compared to information technology or IT products and health care. That's in spite of a number of recent cable tech and content deals.

San Francisco and Silicon Valley are two of the major U.S. centers of venture capital activity; New York, Los Angeles, Philadelphia, Chicago and Dallas are among the other hot spots where VCs operate. Together, dozens of venture capital institutions invested more than $20 billion in 2,067 new companies last year, an 8% increase in dollars from 2003, according to VentureOne, the Dow Jones subsidiary that tracks VC action.

More importantly, the amount of money VCs raised in 2004 for future use was about double that of 2003--$17 billion vs. $8.7 billion. That's the most money VCs have raised in one year since 2000, when Internet stocks tanked. Shortly thereafter, many venture capital firms suspended their quest for big money, disillusioned with the dot-com and Web tech companies they backed.

With renewed positive attitudes for the Internet, IT, health care and nanotechnology, VCs appear willing to fund new entities at a solid clip, if not at the frantic pace of the late 1990s. Along with the money raised during 2003-04, venture capital firms stockpiled about $70-75 billion during the pre-2000 Web boom, according to VentureOne. Result: a giant money pool that can subsidize technology and content companies, which in turn can help cable operators beat their competition, especially with telcos entering the fray.

A Solid Platform for Investment

Cable-related ventures should be a natural target for funding, not only because of cable's huge consumer reach, but because of advanced services such as video on demand, high-definition TV, voice over IP telephony and interactive TV.

"Cable is a powerful network and a good platform for innovation," says Dick Green, CEO of CableLabs. "With so much capacity into the home, and initiatives with digital, VOD and high-speed data, it's a solid play." Green's organization and Comcast's Interactive Capital unit will co-present a VC forum at the National Show April 5.

There has been some movement of capital toward cable, including several cable technology vendors that have picked up millions from VCs since 2000. They include: Arroyo Video Solutions, Cedar Point Communications, RGB Networks, BigBand Networks and Broadbus. These investments have sparked the development of bandwidth expansion infrastructure, VOD servers and VoIP equipment.

Digital cable networks, VOD and ITV content were nowhere on the VC radar screen three years ago. Now there's at least a blip, with TV One, Sí TV, College Sports TV, The Tennis Channel, Gospel Music Channel, Gotuit Media and MyDTV among the ventures with VC participation.

Soros Capital Fund, billionaire George Soros' VC enterprise, invested $25 million in College Sports TV. Two other venture capital firms sank millions into the channel before its launch two years ago: Constellation Ventures, operated by investment banker Bear Stearns, and Athlon Ventures, owned by a consortium of sports stars including Minnesota Timberwolves basketball star Kevin Garnett and Olympic gold medalist Michael Johnson.

Constellation also is backing Gospel Music Channel, along with Alpine Equity Partners.

The High Sign From Comcast and Time Warner

Still, VCs are holding back. Their No. 1 hurdle: Any cable-related venture that seeks funding must have a deal in place with Comcast or Time Warner Cable. If one or both multi-system operators isn't on board, kiss the capital goodbye.

"If you're selling into the cable space and you're not selling this in with one of those guys, you don't have a business," says Alan Beasley, a partner in Redpoint Ventures, a Silicon Valley venture capital firm with stakes in BigBand Networks (bandwidth expansion), Entropic Communications (chips) and Meta TV (ITV software). "We've gotten to know Comcast and Time Warner very well, along with Cox, and it would be very unlikely for us to enter into a cable venture without their support."

Sure, there are other big MSOs and plenty of small or midsize operators VCs could approach with a promising enterprise. "The problem is, so many of the other MSOs wait until [they see] what Comcast or Time Warner does. So that creates a problem," says Gary Lauder, who runs Lauder Partners, a California-based VC firm with a long track record in cable investment.

Venture capitalists also haven't seen much evidence of MSOs embracing new, independent ventures, whether tech or content, Lauder says. "There was a time when cable operators were willing to buy products from small companies," he says. "There was more willingness to take risks with small companies. That's not the attitude these days."

"Operators want to control anything that stands between themselves and their subscribers, rather than foster talent from other companies and let them help the operators' business," Beasley adds. "That has to change."

Lauder's VC investment portfolio includes ITV application/software players ICTV, Integra5 and Navic Networks; BigBand; voice recognition developer Agile TV; and media processor chip vendor Equator. **Like Redpoint, Lauder's firm chooses not to invest in digital cable networks.**

"When you look at the background of these venture firms and what they are good at, typically the background is engineering or technology. That's why they look for a sustainable play in either area that offers a competitive advantage," he says.

VCs also still feel burned by the investments they made in Web content companies, which makes them even more resistant to investing in cable content companies. The cable industry should invest in its own infrastructure and content, they say, not venture capital firms.

Redpoint's Beasley wants cable to tackle the interactive threat from DBS--specifically DirecTV--head on. News Corp., which owns DirecTV, has an advantage over cable because it also owns ITV software/applications vendor NDS. DirecTV will implement its interactive services later this year. "There's more than enough operators out there to partner up with VCs and support an indie software vendor to develop all the ITV content or applications they need to win out," Beasley says.

A Long Haul to Paydirt

Apax Partners is exploring cable opportunities, and so far has made an investment in ITV games provider TVHead. Another cable-related investment is under review. Jacqueline Reses, who directs U.S. media strategy for Apax, says content or tech start-ups can interest venture capitalists, despite their reservations about cable. "If you have a good idea, you can sell it," she says. "You have to be creative, have the right management background and build the right affiliate partnerships with MSOs. It's a hard business to build because of the capital required and barriers to entry, but it can be done."

For Sí TV CEO Jeff Valdez, getting enough venture capital to launch his network in February 2004 was a six-year quest. Valdez won't say how much capital he needed, but he ended up with a handful of providers in his corner: Syncom, Rho Ventures, Columbia Capital and DND. "We were rejected a lot before we scored," Valdez says. "It took a lot of research and educating people on what the investment could provide."

Part of that education includes explaining to VCs how they can exit the scene down the road, once a venture is profitable, says Glen Friedman, a former MSO executive who runs Ideas & Solutions, which develops marketing strategies for media companies. VCs encourage their investment targets to reach the breakeven point within six or seven years and profitability within nine or 10 years.

One way to bypass venture capitalists' hesitation is to highlight cable's innovations, such as the eventual migration to all-digital/Internet protocol infrastructure, says Comcast Interactive Capital managing partner Sam Schwartz. Comcast's VC division has invested more than $250 million since 1999 in technology ventures, including Arroyo, Cedar Point and home networking prospect Intellon.

It took six years for Sí TV CEO Jeff Valdez to raise the venture capital he needed to launch his network.

"Cable is moving to a place where it looks like the rest of the Internet," Schwartz says. "As things become IP-based, we can utilize routers and other technologies associated with the Internet world--leveraging them on a large scale at cheaper cost. If we can show the ways we can take full advantage of those capabilities, including content strategies, that's a strong argument for VCs."

Start-ups also should showcase the independently owned content and vendor companies that have succeeded with the support of VC firms. "You need more poster children to show that the investments can be attractive," Friedman says. "Then operators [will make] more success stories out of new ventures."

Cable start-ups should increase their exposure at VC industry meetings. VentureOne, which holds its annual VC conference next week in San Francisco, isn't covering cable, although Cedar Point will demonstrate VoIP at one session.

Comcast's Schwartz has approached the National Venture Capital Association about making a presentation at its New York conference, to be held May 4-5; it would be the first time the NVCA highlights cable opportunities. (NVCA president Mark Heesen did not respond to requests for an interview.)

Green, Schwartz and Valdez say that cable trade groups should stage VC events at their annual conferences. Green wants to feature content as well as technology at VC presentations that would be held at The Cable Center in Denver. "As TV becomes much more interactive, ITV content and advertising will be extremely important," he says. "That [enables] us to invite a wider range of VCs and new content companies." Green says that cable has not been successful at piercing the consciousness of VCs. "The bottom line is that we can do better at this. Because of competitive pressures on the industry, innovation is very important and funding innovation is critical."

"For the companies that get funded, there are plenty of others that didn't," says Friedman. "If you want to be attractive to VCs, you have to go back to the old days of cable and get the operators to make it a better entry environment for entrepreneurs. Make the payout for them more attractive."

No Cable Category for VCs

There's no easy way to calculate how much VC firms invest in cable content and technology start-ups.

For instance, VentureOne, the Dow Jones unit that follows VC activity, doesn't break out cable deals into a separate category.

Instead, technology initiatives fall into several categories, depending on the nature of the tech. "Some run under multimedia networking software, others run as electronics," says VentureOne research manager Matt Garlick. As for digital cable network and other content investments, they are grouped with broadcasting network deals.

In 2004, VCs invested $175 million in broadcasting plays, up from $115 million in 2003, according to VentureOne. Although the dollar amount grew 52%, the number of deals did not budge. Nine deals were completed each year.

Multimedia software VC investments reached $287 million last year, a jump from $211 million in 2003.

--*S.A.*

Attract Venture Capital in Six E-Z Steps

Trying to get VC funding for your cable content or technology start-up?

Here's how:

- Have a deal already in place with Comcast, Time Warner Cable or both when you call on VCs.
- Crash events at which VC executives meet, such as those sponsored by the Churchill Club in San Francisco, or by Young Startup and iBreakfast in New York.
- Impress VCs with a management team whose individual members have great track records.
- See as many VCs as possible.
- Stress how your programming or technology gives cable operators an edge against their competitors.
- Make sure no one steals your idea.

--*S.A.*

Exhibit 4: Excerpts from Broadcasting & Cable article, 04/04/2005

From Darth Vader To Yoda, John Malone on his career, the fate of his company, and the future of the TV industry

By Mark Robichaux -- Broadcasting & Cable, 4/4/2005

(excerpts)

You said the industry was turning into a handful of big operators.

I'm not sure it's an industry anymore. I think it may be just a few big guys, a couple of big guys—and they either work together or they don't—and a bunch of little guys the big guys don't pay much attention to anymore.

Basically, the consolidation of the business has got to the point where I don't believe that an independent programmer has any chance whatsoever of doing anything unless he's heavily invested in and supported by one of the major distributors.

But you were in this very catbird seat just eight years ago. This now sounds like a different tune.

TCI was never big enough that we could stop anything. We were big enough that we could help something that was a good idea to get going, but we could never kill anybody. But there's no way on earth that you can be successful in the U.S. distributing a channel that Brian Roberts doesn't carry, particularly if he has one that competes with it. And probably pretty soon the same can be said of Rupert Murdoch.

I think the consolidation has gone that far. I'm not saying that's good or bad. I'm just saying that's true.

Do you think the government will step in at some point?

I don't know. I mean the government stepped in and gave retransmission consent to the broadcasters, which pretty well wiped out any chance that independent programmers had anyway, right? I mean, if you look at what happened since retransmission consent was signed, virtually all programming, all the networks that are successful have evolved toward ownership by a broadcast network. So you've seen the consolidation both on the broadcast network side and on the distribution side to the point where small independents really don't have a chance.

Can I believe my ears? Darth Vader taking up for the little guy now?

I'm just expressing the view that that's the stage consolidation has reached.

I get guys in here with good programming ideas asking me how to get distribution for them, and I tell them the same thing, which is you gotta go make a deal with Comcast or with News Corp. or you probably ought to abandon your idea or wait until the Internet and then offer it as a streaming-video Web site and that will eventually succeed in providing an alternate route to the end consumer. But right now, you can't start something with traditional cable-network economics and hope to be successful. It's just not in the cards.

Exhibit 5: Study: Carriage of Affiliated and Unaffiliated Networks Entering the Market Between January 1, 2003 and March 15, 2005

This exhibit includes raw data from our preliminary research on recent industry developments -- specifically adoption of new affiliated and unaffiliated networks by the largest cable operators, during the period from January 1, 2003 to May 15, 2005 (a nearly 2 ½ year period). Only networks which sought initial launch of their programming service during the period were included in this study. This study is limited by the availability of public announcements regarding channel launches.

Sources of data: Universe of networks seeking carriage derived from National Cable and Telecommunications Association records. All network launch dates are according to company filings with the National Cable and Telecommunications Association, as well as publicly available sources. Ownership information, subscriber data and carriage information are all from publicly available sources, including the National Telecommunications Association, industry news sources such as Multichannel News and Kagan Research, as well as corporate announcements, filings and marketing materials.

Definitions used in study:

- *Affiliated Network*: any Network with financial ties to Comcast, Time Warner, Viacom, News Corp, NBC Universal, Disney, or their subsidiaries.
- *Unaffiliated Network/ Independent Network*: any Network without financial ties to Comcast, Time Warner, Viacom, News Corp, NBC Universal, Disney, or their subsidiaries.
- *Networks Seeking National Carriage*: Any Network that is currently or would be expected to be carried on a broad basis. There are two categories of National Carriage used in this report:
    - *Standard Carriage*: Network is carried as a non-premium service as part of a broadly distributed package.
    - *Premium Carriage:* Subscribers must pay an additional fee to receive the network, either individually or as part of a tier of channels (i.e. a sports package).
- *Networks Seeking Regional Carriage*: Networks which are intended for an audience which is concentrated in one or more specific geographic regions. For purposes of this research, we considered any non-English language Network, to be a network seeking regional carriage. In addition, networks that secure regional carriage are often offered as premium services.
        - *Imported Network* – Network seeking regional carriage which is substantially the same as an existing foreign network.

Exhibit 5a: Summary Statistics, Comcast and Time Warner

Comcast Statistics	
Total Comcast carriage of all affiliated networks seeking National carriage	53%
Total Comcast carriage of all unaffiliated networks seeking National carriage	6%
Comcast carriage on Standard basis of all unaffiliated networks seeking National carriage	0.88%
Comcast carriage on Premium basis of all unaffiliated networks seeking National carriage	5%
Total Comcast carriage of all affiliated networks seeking Regional carriage	78%
Total Comcast carriage of all unaffiliated networks seeking Regional carriage	42%
Total Comcast carriage of "New," unaffiliated networks seeking Regional carriage	31%

Time Warner Cable Statistics	
Total TWC carriage of all affiliated networks seeking National carriage	42%
Total TWC carriage of all unaffiliated networks seeking National carriage	4%
TWC carriage on Standard basis of all unaffiliated networks seeking National carriage	0.88%
TWC carriage on Premium basis of all unaffiliated networks seeking National carriage	4%
Total TWC carriage of all affiliated networks seeking Regional carriage	11%
Total TWC carriage of all unaffiliated networks seeking Regional carriage	8%
Total TWC carriage of "New," unaffiliated networks seeking Regional carriage	15%

Exhibit 5b: Summary Statistics, National and Regional Carriage

Networks Seeking National Carriage

	Total	Unaffiliated	Affiliated
Total Networks Seeking National Carriage	133	114	19
Total Launched Networks - Standard Carriage	13	7	6
Total Launched Networks - Premium Carriage	20	8	12
% Standard Carriage of Affiliated nets seeking National	32%		
% Premium Carriage of Affiliated nets seeking National	63%		
% Carriage (any kind) of Affiliated nets seeking National	95%		
% Standard Carriage of Unaffiliated nets seeking National	6%		
% Premium Carriage of Unaffiliated nets seeking National	7%		
% Carriage (any kind) of Unaffiliated nets seeking National	13%		

Networks Seeking Regional Carriage

	Total	Unaffiliated	Affiliated
Total Networks seeking regional carriage	35	26	9
Imported Networks seeking regional carriage	18	13	5
"New" networks seeking regional carriage	17	13	4
Total Launched Regional Networks	25	17	8
Total Launched Imported Networks	16	12	4
Total Launched "New" networks seeking regional carriage	9	5	4
Success rate of Affiliated nets seeking regional carriage	89%		
Success rate of "New," Affiliated networks	100%		
Success rate of "New," unaffiliated networks	38%		

Exhibit 5c: Carriage Results: Networks Seeking National Carriage

Standard Carriage

Affiliated		Total Subscribers	Comcast carriage (1=yes)	TWC carriage (1=yes)	additional notes
1	ESPN Deportes	7,000,000	0	0	Launched January 2004
2	Fox Reality (launching May 2005)	17,000,000	0	0	carriage secured, subscriber count is industry estimate
3	Fuel	12,000,000	0	1	*primarily non-premium but carried by TWC as premium
4	Logo (Launching June 2005)	10,000,000	0	1	carriage secured, subscriber count is industry estimate
5	SiTV	10,000,000	1	1	Time Warner owned
6	TV One	20,000,000	1	0**	Comcast owned -- **Since research has been carried by TW
	TOTAL COMCAST		**2**		
	% of Total Affiliated Nets seeking National Carriage		**11%**		
	TOTAL TIME WARNER			**3**	
	% of Total Affiliated Nets seeking National Carriage			**16%**	

mean subscriber count	**12,666,667**
median subscriber count	**11,000,000**

Unaffiliated		Total Subscribers	Comcast carriage (1=yes)	TWC carriage (1=yes)	additional notes
1	Anime Network	532,000	0	0	carried on Insight and Buckeye subscriber count is estimated at 35% of total analog customer base
2	BlueHighways TV	595,000	0	0	carried on Insight and Bresnan, subscriber count is estimated at 35% of total analog customer base
3	Gospel Music Channel	1,000,000	0	0	Carried by Cox
4	Mav TV	300,000	0	0	
5	NFL Network	24,000,000	1	0	Carried by Comcast, DirecTV, Charter, Bresnan, Adelphia, and others
6	Sportsman Channel	11,500,000	0	1	Carried only by TWC
7	Wealth TV (HD)	2,100,000	0	0	Carried by Charter and Metrocast on digital tiers, subscriber count is estimated at 35% of analog sub count
*	Blackbelt TV (hunting license only)	-	*	0	hunting license only, no carriage as of 3/15/2005
	TOTAL COMCAST		**1**		
	% of Total Unaffiliated Nets seeking National Carriage		**0.88%**		
	TOTAL TIME WARNER			**1**	
	% of Total Unaffiliated Nets seeking National Carriage			**0.88%**	

mean sub count (does not include Blackbelt TV)	**5,718,143**
median sub count (does not include Blackbelt TV)	**1,000,000**

Premium Carriage

Affiliated

1	Cinemax HD	n/a	1	0
2	ESPN HD	n/a	1	1
3	ESPN2 HD	n/a	0	0
4	ESPNU	n/a	0	0
5	History Channel en Espanol	n/a	1	0
6	in HD	n/a	1	1
7	in HD2	n/a	1	1
8	Showtime HD	n/a	1	1
9	Starz HDTV	n/a	1	0
10	The Movie Channel HD	n/a	0	0
11	TNT in HD	n/a	1	1
12	Universal HD	n/a	0	0
	TOTAL COMCAST		**8**	
	% of Total Affiliated Nets seeking National Carı		**42%**	
	TOTAL TIME WARNER			**5**
	% of Total Affiliated Nets seeking National Carriage			**26%**

Unaffiliated

1	Bridges TV	10,000	1	0	10,000+ paying members, carried by Comcast in Detroit
2	CSTV (College Sports TV)	n/a	1	1	available to 65 million homes on sports tiers, carried by top 6 distributors + others
3	GolTV	n/a	1	0	Carried on Hispanic and sports tiers (available in English and Spanish language)
4	HD Net Movies	n/a	0	1	carried on HD tier
5	Horse Racing TV	1,500,000	1	1	Carried on sports tiers, *some basic carriage from twc
6	NFL Network HD	n/a	1	0	Carried on select systems only
7	Q Television	n/a	0	0	Carried by RCN. Available to 400,000 homes.
8	Tennis Channel	3,000,000	1	1	carried on sports tiers
	TOTAL COMCAST		**6**		
	% of Total Unaffiliated Nets seeking National C		**5.26%**		
	TOTAL TIME WARNER			**4**	
	% of Total Unaffiliated Nets seeking National Carriage			**3.51%**	

Exhibit 5d: Data, Networks Seeking National Carriage

	Network Name	Affiliated?	Launched Network? Standard U.S. Carriage?	Launched Network? Premium service?	Affiliated and Standard	Affiliated and Premium
1	**29HD Network**				NO	NO
2	**Action Channel**				NO	NO
3	**Africast Television Network**				NO	NO
4	**America Channel, The**				NO	NO
5	**America National Network**				NO	NO
6	**American David**				NO	NO
7	**Amp TV**				NO	NO
8	**Anime Network**		1		NO	NO
9	**Anti-Aging Network**				NO	NO
10	**Applause Networks**				NO	NO
11	**Asia Channel**				NO	NO
12	**Auto Channel, The**				NO	NO
13	**Baby TV**				NO	NO
14	**Beauty & Fashion Channel (shopping channel)**				NO	NO
15	**Beauty Channel, The**				NO	NO
16	**Better Life Media**				NO	NO
17	**Bingo TV**				NO	NO
18	**Black Belt TV**				NO	NO
19	**Black Education Network**				NO	NO
20	**Black Entertainment Network**				NO	NO
21	**Black Television News Channel (BTNC)**				NO	NO
22	**Black Women's TV**				NO	NO
23	**Blackbelt TV (*hunting license only)**		*		NO	NO
24	**BlueHighways TV**		1		NO	NO
25	**Boating Channel, The**				NO	NO
26	**BOB: Brief Original Broadcasts**				NO	NO
27	**Book Shopping Channel**				NO	NO
28	**BOX TV--The Boxing Channel**				NO	NO
29	**Brands Shopping Network**				NO	NO
30	**Bridges TV**			1	NO	NO
31	**Cable Science Network**				NO	NO
32	**Career Entertainment Television**				NO	NO
33	**Casino & Gaming Television**				NO	NO
34	**Cinemax HD**	1		1	NO	YES
35	**Classified Channel, The**				NO	NO
36	**Collectors Channel**				NO	NO
37	**CSTV (College Sports TV)**			1	NO	NO
38	**Dance Competition Network**				NO	NO
39	**Destiny Channel**				NO	NO

40	**Documentary Channel, The**				NO	NO
41	**DoD - Def on Demand**				NO	NO
42	**Edge TV**				NO	NO
43	**Employment & Career Channel, The**				NO	NO
44	**Epic Sports Channel (X Channel)**				NO	NO
45	**ESPN Deportes**	1	1		YES	NO
46	**ESPN HD**	1		1	NO	YES
47	**ESPN2 HD**	1		1	NO	YES
48	**ESPNU**	1		1	NO	YES
49	**Eurocinema**				NO	NO
50	**FAD TV: Fashion and Design Television**				NO	NO
51	**Film Festival Channel, The**				NO	NO
52	**Fox Reality**	1	1		YES	NO
53	**Fuel**	1	1		YES	NO
54	**GETV Program Network**				NO	NO
55	**Global Village Network**				NO	NO
56	**God TV**				NO	NO
57	**GolTV**			1	NO	NO
58	**Gospel Music Channel**		1		NO	NO
59	**Government Channel, The**				NO	NO
60	**H.Y.P.E. TV**				NO	NO
61	**Hallmark Movie Channel**				NO	NO
62	**Harmony Channel**				NO	NO
63	**HD Net Movies**			1	NO	NO
64	**Health Broadcasting Network**				NO	NO
65	**Healthy Living Network**				NO	NO
66	**here! tv**				NO	NO
67	**History Channel En Espanol**	1		1	NO	YES
68	**Home Improvement Channel**				NO	NO
69	**Horror Channel, The**				NO	NO
70	**HorrorNet**				NO	NO
71	**Horse Racing TV**			1	NO	NO
72	**Horse TV**				NO	NO
73	**Ice Channel, The**				NO	NO
74	**in HD**	1		1	NO	YES
75	**in HD2**	1		1	NO	YES
76	**iNetwork**				NO	NO
77	**Inpulse TV**				NO	NO
78	**Investment TV**				NO	NO
79	**JokeVision**				NO	NO
80	**JTV**				NO	NO
81	**Local News Network**				NO	NO
82	**LOGO**	1	1		YES	NO
83	**Luxury Television Network**				NO	NO
84	**Martial Arts Action Network, The**				NO	NO
85	**Martial Arts Channel**				NO	NO
86	**MavTV**		1		NO	NO
87	**Moore TV Network**				NO	NO

88	**Moviewatch**				NO	NO
89	**Music of Praise Network**				NO	NO
90	**Music Plus TV**				NO	NO
91	**NANO TV**				NO	NO
92	**NFL Network**		1		NO	NO
93	**NFL Network HD**			1	NO	NO
94	**ORB TV**				NO	NO
95	**Performance Showcase**				NO	NO
96	**Players Network**				NO	NO
97	**Puppy Channel ®, The**				NO	NO
98	**Q Television**			1	NO	NO
99	**RadioTV Network**				NO	NO
100	**Real Estate Channel**				NO	NO
101	**Real Estate Network, Inc., The (TREN®)**				NO	NO
102	**Real Hip Hop Network, The**				NO	NO
103	**Reality 24/7 (a.k.a Reality Central)**				NO	NO
104	**Resorts & Residence TV**				NO	NO
105	**RipeTV**				NO	NO
106	**Seminar TV**				NO	NO
107	**Senior Citizens Network**				NO	NO
108	**Showtime HD**	1		1	NO	YES
109	**Si TV**	1	1		YES	NO
110	**Sportsman Channel**		1		NO	NO
111	**Stand Up Comedy TV**				NO	NO
112	**Starz HDTV**	1		1	NO	YES
113	**Sundance Documentary Channel**	1			NO	NO
114	**Tennis Channel**			1	NO	NO
115	**TFN, The Football Network**				NO	NO
116	**The Movie Channel HD**	1		1	NO	YES
117	**Theatre Channel, The**				NO	NO
118	**Ticket Channel, The (formerly Tickets on Demand)**				NO	NO
119	**TNT in HD**	1		1	NO	YES
120	**TV One**	1	1		YES	NO
121	**U.S. Military Television Network, Inc.**				NO	NO
122	**Universal HD**	1		1	NO	YES
123	**Varsity Television**				NO	NO
124	**Vegas Channel, The**				NO	NO
125	**Voy Network**				NO	NO
126	**Wealth TV**		1		NO	NO
127	**Wheels TV**				NO	NO
128	**Wine Network TV**				NO	NO
129	**World Championship Sports Network**				NO	NO
130	**World Cinema**				NO	NO
131	**WorldAsia TV**				NO	NO
132	**XY.tv**				NO	NO
133	**Youth Sports Broadcasting Channel**				NO	NO

Exhibit 5e: Carriage Results, Networks Seeking Regional Carriage

Regional Carriage

Note: ^ denotes channel which is "imported" (substantially a recreation of an existing foreign network).

Affiliated

1	BravesVision	n/a	1	0	Comcast owned
2	^Channel One Russia	n/a	0	0	distributed by Comcast's International Channel Networks, carried by Dish
3	Comcast SportsNet Chicago	3,400,000	1	0	Comcast owned
4	Comcast SportsNet West	2,200,000	1	0	Comcast owned
5	Dallas Cowboys Channel	n/a	1	0	Comcast owned
6	^Telemundo Puerto Rico	1,300,000	0	0	Import of NBC owned affiliate from Puerto Rico
7	^TV Polonia	n/a	1	1	distributed by Comcast's International Channel Networks
8	^TVK1	n/a	1	0	US import of Munhwa Broadcasting Corp. distributed by Comcast's International Channel Networks
9	^TVK2	n/a	1	0	US import of Munhwa Broadcasting Corp. distributed by Comcast's International Channel Networks
	TOTAL COMCAST		**7**		
	% of Total Affiliated Nets seeking REGIONAL Carriage		**78%**		
	TOTAL TIME WARNER			**1**	
	% of Total Affiliated Nets seeking REGIONAL Carriage			**11%**	

Unaffiliated

1	^Azteca America	n/a	1	n/a	Wholly owned by TV Azteca, one of two Mexican broadcasters, it is essentially a rebroadcast of TV Azteca's Mexican channels. Carried in Los Angeles and other select markets
2	Boston Kids & Family	150,000	1	0	Boston area only
3	Carolina Sports Entertainment	800,000	0	1	North and South Carolina only
4	^Dragon TV (7 channel suite) 1 - Set Intern	n/a	1	0	Rebroadcast of Taiwan channel. San Francisco area only
5	Dragon TV (7 channel suite) 2 - ET News	n/a	1	0	Primarily imported programming, but some US produced News. San Francisco area only
6	^Dragon TV (7 channel suite) 3 - ET Drama	n/a	1	0	Content imported from Chinese and Taiwanese broadcasters. Carried in San Francisco area only
7	^Dragon TV (7 channel suite) 4 - ET Globa	n/a	1	0	Content imported from Chinese and Taiwanese broadcasters. Carried in San Francisco area only
8	^Dragon TV (7 channel suite) 5 - ET China	n/a	1	0	Content imported from Chinese and Taiwanese broadcasters. Carried in San Francisco area only
9	^Dragon TV (7 channel suite) 6 - ET Yoyo	n/a	1	0	Content imported from Chinese and Taiwanese broadcasters. Carried in San Francisco area only
10	^Dragon TV (7 channel suite) 7 - CCTV	n/a	1	0	State network of People's Republic of China. Carried in San Francisco area only
11	ImaginAsian TV	2,500,000	1	0	Comcast carries in San Francisco, Los Angeles only
12	Sorpresa	1,000,000	1	1	
13	^Tu TV: De Película Clásico	n/a	0	0	Total subs for all TuTV nets is 1,215,239. Carried by Cox, Bresnan on Latin tier
14	^Tu TV: Bandamax	n/a	0	0	Total subs for all TuTV nets is 1,215,239. Carried by Cox, Bresnan on Latin tier
15	^Tu TV: De Pelicula	n/a	0	0	Total subs for all TuTV nets is 1,215,239. Carried by Cox, Bresnan on Latin tier
16	^Tu TV: Ritmoson Latino	n/a	0	0	Total subs for all TuTV nets is 1,215,239. Carried by Cox on Latin tier
17	^Tu TV: Telehit	n/a	0	0	Total subs for all TuTV nets is 1,215,239. Carried by Cox, Bresnan on Latin tier
	TOTAL COMCAST		**11**		
	% of Total Unaffiliated Nets seeking REGIONAL Carriage		**42%**		
	% of "New," unaffiliated Nets seeking REGIONAL Carriag		**31%**		
	TOTAL TIME WARNER			**2**	
	% of Total Unaffiliated Nets seeking REGIONAL Carriage			**7.69%**	
	% of "New," unaffiliated Nets seeking REGIONAL Carriage			**15%**	

Exhibit 5f: Data, Networks Seeking Regional Carriage

	Network Name	Imported?	Affiliated?	Carriage
1	**Azteca America**	**1**		1
2	**Boston Kids & Family**			1
3	**BravesVision**		1	1
4	**Caribbean Visions Television**			
5	**Carolina Sports Entertainment**			1
6	**Channel One Russia Worldwide Network**	**1**	1	0
7	**Comcast SportsNet Chicago**		1	1
8	**Comcast SportsNet West**		1	1
9	**Dallas Cowboys Channel**		1	1
10	**Dragon TV (7 channel suite) 1 - Set International**	**1**		1
11	**Dragon TV (7 channel suite) 2 - ET News**			1
12	**Dragon TV (7 channel suite) 3 - ET Drama**	**1**		1
13	**Dragon TV (7 channel suite) 4 - ET Global**	**1**		1
14	**Dragon TV (7 channel suite) 5 - ET China**	**1**		1
15	**Dragon TV (7 channel suite) 6 - ET Yoyo**	**1**		1
16	**Dragon TV (7 channel suite) 7 - CCTV**	**1**		1
17	**ImaginAsianTV**			1
18	**Mexicanal**	**1**		
19	**Native American Nations Program Network**			
20	**Novelas Channel**			
21	**Outstanding Latin Entertainment**			
22	**Royals Television Network**			
23	**Shalom TV**			
24	**Sorpresa!**			1
25	**Southern Entertainment Television**			
26	**Telemundo Puerto Rico**	**1**	1	1
27	**Telenovela TV**			
28	**Television Korea 24 (TVK1)**	**1**	1	1
29	**Television Korea 24 (TVK2)**	**1**	1	1
30	**Tu TV: De Película Clásico**	**1**		1
31	**Tu TV: Bandamax**	**1**		1
32	**Tu TV: De Pelicula**	**1**		1
33	**Tu TV: Ritmoson Latino**	**1**		1
34	**Tu TV: Telehit**	**1**		1
35	**TV Polonia**	**1**	1	1